85-388 (1)

No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

JOSEPHINE A. DILLON, Committee of
HILDA NADINE AMIDON, a legally
incompetent person,

Petitioner,

v.

POTOMAC HOSPITAL CORPORATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

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QUESTIONS PRESENTED

1. Whether Section 8.01-35.1 (d) of the Code of Virginia violates the Due Process Clause of the United States Constitution by retroactively affecting a joint tortfeasor's statutorily created right of contribution?

2. Whether the Virginia Supreme Court can announce a new constitutional principal and apply it to the parties in this case?

3. Whether a joint tortfeasor who has claimed and accepted benefits under a statute should be estopped from claiming that the same statute is unconstitutional?

PARTIES

All parties below are shown in the caption of this petition. However, pursuant to Rule 28 (c), the Attorney General of the State of Virginia may be a party and 28 U.S.C. Section 2403 (b) may be applicable. A copy of this Petition will be served upon the Attorney General of the State of Virginia.

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v.

POTOMAC HOSPITAL CORPORATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

The Petitioner, Josephine A. Dillon, Committee of Hilda Nadine Amidon, a legally incompetent person, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the Virginia Supreme Court entered in this proceeding on April 26, 1985. The Motion to Rehear was denied on June 14, 1985.

OPINIONS BELOW

The opinion of the Trial Court appears in the Appendix hereto. The opinion of the Supreme Court of Virginia can be found at 229 Va. , 329, S.E.2d 41 (1985). (See Appendix).

JURISDICTION

The judgment of the Supreme Court of Virginia was entered on April 26, 1985. A timely Petition for Rehearing was denied on June 14, 1985 (See Appendix). This Petition for

Certiorari was filed within ninety (90) days of that date. This Court's jurisdiction is invoked under 28 U.S.C. Section 1257 (3).

STATUTORY PROVISIONS INVOLVED

Section 8.01-35.1, Code of Virginia:

> Effect of release or covenant not to sue in respect to liability and contribution—A. When a release or a covenant not to sue is given in good faith to one of two or more persons liable in tort for the same injury, or the same property damage or the same wrongful death:
>
> 1. It shall not discharge any of the other tortfeasors from liability for the injury, property damage or wrongful death unless its terms so provide,; but any amount recovered against the other tortfeasors or any one of them shall be reduced by any amount stipulated by the covenant or the release, or in the amount of the consideration paid for it, whichever is the greater. A release or covenant not to sue given pursuant to this section shall not be admitted into evidence in the trial of the matter but shall be considered by the court in determining the amount for which judgment shall be entered; and
>
> 2. It shall discharge the tortfeasor to whom it is given from all liability for contribution to any other tortfeasor.
>
> B. A tortfeasor who enters into a release or covenant not to sue with a claimant is not entitled to recover by way of contribution from another tortfeasor whose liability for the injury, property damage or wrongful death is not extinguished by the release or covenant not to sue, nor in respect to any amount paid by the tortfeasor which is in excess of what was reasonable.
>
> C. A release or covenant not to sue given pursuant to this section shall be subject to the provisions of Section 8.01-55 and 8.01-424.
>
> D. *This section shall apply to all such covenants not to sue executed on or after July 1, 1979, and to all releases*

executed on or after July 1, 1980, regardless of the date the causes of action affected thereby accrued (emphasis mine).

STATEMENT OF THE CASE

On September 12, 1977, Amidon, a 54-year old woman, was admitted as a patient to Respondent Hospital for a medical workup for a D & C operation. She was operated upon on September 16, 1977. During the operation, Amidon sustained loss of oxygen to the brain which resulted in severe cerebral damage. She has been in a coma ever since that date. She has been in a nursing home, requiring 24-hour care, since 1978.

Petitioner sued William Moss ("Moss"), the Respondent Hospital's former administrator, James C. Kent, M.D., ("Dr. Kent"), Mehdi Jandaghi, M.D. ("Dr. Jandaghi"), Socorro Tamase, M.D. ("Dr. Tamase") and the Respondent Hospital, jointly and severally, for medical malpractice in connection with the operation performed on September 16, 1977. The Motion for Judgment was filed on January 8, 1980 in the Circuit Court of Prince William County, Virginia. Petitoner filed an amended Motion for Judgment on October 27, 1982. Dr. Tamase died on January 21, 1981, and her administrator, Darwyn H. Lesh ("Lesh"), was substituted as a party defendant. Moss was nonsuited by Order of the Trial Court entered on February 3, 1983.

Prior to trial on the merits, Dillon reached a settlement agreement with Dr. Kent, Dr. Jandaghi, and Lesh which she petitioned the Trial Court to ratify. Dillon prepared a document entitled "Consent Not To Sue Pursuant to Section 8.01-35.1 Code of Virginia" which released Dr. Kent, Dr. Jandaghi, and Lesh from all liability in return for a payment of $475,000. The Court entered an Order pursuant to Section 8.01-35.1, Code of Virginia (the covenant not to sue statute) dismissing Kent, Jandaghi and Lesh, but reserving the cause of action against the Respondent.

The Respondent filed a written Motion for Summary Judgment on August 10, 1983, which was heard on August 12, 1983. The Respondent Hospital argued that the right of

contribution is a "property right" which came about on September 16, 1977 (the date of the negligence) and that retroactive application of Va. Code Section 8.01-35.1 unconstitutionally destroyed this right. Therefore the Hospital argued, the case against them should be dismissed since, under Virginia law, prior to the enactment of the statute, a release of one joint tortfeasor released all joint tortfeasors.

The Trial Court reserved its ruling on the motion, and nine-day jury trial on the issue of the Hospital's liability ensued. The jury held that the Hospital was negligent and awarded damages of 1.2 million dollars. The Hospital renewed its Motion for Summary Judgment in writing on September 16, 1983. In this motion the Respondent argued that the statute's retroactive application deprived it of it's "vested" right of contribution. This motion was denied and the Trial Court set out its reasons for its denial of the Hospital's motion in a Memorandum Opinion (See Appendix).

The Trial Court ruled on December 16, 1983 that the Respondent's right to contribution is a inchoate rather than a vested right. Further, the Trial Court cited authority to the effect that inchoate rights are subject to retroactive alteration by Legislative dictate at any time prior to their vesting without violating the United States Constitution. Finally, the Trial Court held that the Virginia Legislature had not destroyed the Respondent's right to contribution but had "provided a new procedure for its enforcement". Therefore, Respondent's motion was denied.

Subsequently, after Respondent's Motion was overruled, Respondent argued that it was entitled to a credit of $475,000 against the jury verdict pursuant to the same statute. That Motion was granted, the verdict was accordingly reduced, and the Final Order was entered by the Trial Court on December 29, 1983.

The Respondent Hospital appealed in a timely fashion. On appeal, Respondent dropped the argument that the right of contribution was a "property right", and dropped the argument that the right of contribution was a "vested right". Instead, it merely argued to the Virginia Supreme Court that it was a

"substantive" right, and, as such, the legislature could not, by express intent, retroactively alter it. A majority of the Virginia Supreme Court held that subsection (d) of Section 8.01-35.1 violates the Due Process Clause of the Constitution by retroactively affecting the Respondent Hospital's "substantive right of contribution". The dissent held that since the Respondent claimed and accepted a $475,000 benefit conferred by the statute, it should be estopped from challenging that statute's constitutionality.

Petitioner timely filed a Motion to Rehear before the Virginia Supreme Court. The Petition to Rehear was denied by the Virginia Supreme Court on June 14, 1985. However, by Order dated August 22, 1985, the Virginia Supreme Court stayed execution of judgment until September 12, 1985, "unless the case has before that time docketed in the Supreme Court of the United States, in which event enforcement thereof shall be stayed until the final determination of the case by that Court." (See Appendix)

REASONS FOR GRANTING THE WRIT

1. The Decision Below Sets Out An Erroneous Constitutional Standard That Has Never Been Accepted By Any State Court, Any Federal Appellate Court, Or This Court, And That Ignores Two Recent Decisions By This Court.

The Virginia Supreme Court in our case has pronounced that a legislative body, even with clear expression of its intent, cannot constitutionally enact a statute that retroactively alters a mere inchoate right. This is a principal of constitutional law that has never been accepted by any state court, by any federal appellate court, or by this Court. Further, such a constitutional proposition not only is contrary to traditional principals of law but also ignores the dictates of two decisions of this Court rendered in the last year. If this decision is allowed to stand, it will not only be grossly inequitable and unfair to Petitioner

herein, but it will also have a dire effect on the legislative function for years to come. A brief review of the inchoate right of contribution clearly shows how erroneous our decision is.

At common law there was no right to contribution between tortfeasors. The reason for the rule rested on considerations of sound public policy which disallowed a tortfeasor from "finding" an action as a result of his own wrongdoing. Vol. 18, *C.J.S., Contribution,* Section 11 (cases too numerous to cite).

The common law rule against contribution was abrogated in many states by the legislatures through the years. The legislatures recognized that it would unfair for one joint tortfeasor to shoulder the entire blame for a tort committed by several joint tortfeasors. The Virginia General Assembly by statute recognized a cause of action for contribution in 1919. *Nationwide Mutual Insurance Co., v. Jewel Tea Co.,* 202 Va. 527, 198 S.E.2d 646 (1961). It has remained a statutory cause of action in Virginia since that time.

On July 1, 1979, the Virginia General Assembly enacted Section 8.01-35.1 commonly known as the "covenant not to sue" statute. Virginia was the last state in the country to enact a "covenant not to sue" statute. The statute law did not "abolish" the right of contribution but did alter the method of computing contribution between tortfeasors *and* changed the old rule which was that a release of one of several joint tortfeasors operated as a release of all.

On April 1, 1982 the Virginia General Assembly amended the statute by adding subsection (d) which provides in pertinent part, that the statute shall apply to "covenants not to sue executed on or after July 1, 1979 . . . regardless of the date the causes of action affected thereby accrued."

The public policy reasons for the legislature enacting the statute was clearly recognized by the Virginia Supreme Court in *Hayman v. Patio Products, Inc.* 226 Va 482, 311 S.E.2d 752, at 755 (1984) wherein the Court held:

> "We believe the General Assembly intended to change a rule of law which tended to reward a

> recalcitrant tortfeasor at the expense of a joint tortfeasor who was willing to settle out of court." [1]

The *reason* for the change in the law is, of course, extremely important whenever a Court confronts a due process attack on retroactive legislation. In *Pension Benefit Guar. Corp. v. Gray*, ____U.S.____, 104 S.Ct. 2709 (1984) this Court, in a unanimous decision, employed a "rational means" test to a similar due process argument. The Court held that:

> "provided that the retroactive application of a statute is supported by a legitimate legislative purpose furthered by *rational means*, the wisdom of such legislation *remains within the exclusive province of* the *legislative* and executive *branches* . . . The retroactive aspects of legislation, as well as the prospective aspects must meet the test of due process, and the justifications for the latter may not suffice for the former (citation omitted). *But that burden is met simply by showing that the retroactive application of the legislation is itself justified by a rational legislative purpose.* 104 S.Ct. at 2718 (emphasis mine)." [2]

In a decision rendered by this Court on April 1, 1985, the *Pension Benefit* "rational means" test was employed on a due process attack involving the retroactive application of the Federal Land Policy and Management Act. In *U.S. v. Locke*, ____U.S.____, 105 S.Ct. 1785 (1985) this Court held that "retroactive application of (FLPMA) is supported by a legitimate legislative purpose furthered by rational means (citing

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[1] The statute encourages settlement. Public policy in Virginia and elsewhere favors settlement. Vol. 4A, Michies Jurisprudence, *Compromise and Settlement*, Section 4 (Supp. 1984). In fact, Chief Justice Burger has recently publically urged that the legal system find ways *to encourage settlements* of disputes to relieve our overcrowded court system. See A.B.A. Journal, August, 1985, p.33. The practical effect of the decision below is to discourage pre-trial settlement.

[2] Counsel for Petitioner sent to the Virginia Supreme Court copies of the *Pension Benefit* case and urged the Court, at oral argument and in its Petition to Rehear, to employ the "rational means" analysis in our case. The Virginia Supreme Court simply ignored the *Pension Benefit* case and it's "due process" analysis.

Pension Benefit)", therefore the due process challenge was denied. The Virginia Supreme Court completely ignored the "rational means" analysis in its decision without comment.

The Virginia Supreme Court did state that subsection (d) of the Covenant Not to Sue statute violated the due process rights of the Respondent.[3] The Court reversed the judgment of the trial court and entered final judgment for the Hospital. The decision not only announced an erroneous Constitutional principal that thwarted express legislative intent and ignored recent pronouncements of this Court, but the remedy employed served to completely free the Respondent Hospital of shouldering any blame whatsoever for a tort the Trial Court jury announced the Respondent should be held accountable for.[4] Their tort, as mentioned. left a patient in a comatose condition, yet *they* are

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[3] The Court cites as "authority" for that proposition dicta in *Shiflet v. Eller*, 227 Va. , 319 S.E.2d 750 (1984). *Shiflet* is a !984 Virginia Supreme Court case that did not involve any constitutional issue. It was purely a case of statutory construction that relied on Virginia's savings statute, Section 8.01-1.

Prior to our decision, with the sole exception of a Federal District Court case, *Carickhoff v. Badger Northland Inc.*, 562 F. Supp. 160 (W.D. Va 1983), no state or federal court anywhere has given a joint tortfeasor's right to contribution constitutional protection from retroactive alteration. *Carickhoff* wasn't even relied on or cited by the Court in our case. It was recently discussed, see *Comment, Release of Joint Tortfeasors: Virginia's Code Section 8.01-35.1 And Its Retoractive Application*, Vol. 18 U. Rich. L. Rev. 829, where the author examines the reasoning and authority cited in *Carickhoff*, and severely criticizes its holding. For contrary result, see: *Statzer v. King Kutter Corp.*, 550 F. Supp. 1062, 1065 (W.D. Va. 1982).

[4] For some reason the decision below never explicitly states which Constitution (State or Federal) that it relied on. However, it is clear that the decision relied upon the due process clause of the *Federal*, not State, Constitution. The trial court decision, which was the subject of the appeal below, decided the issue on the *Federal* Constitution only. Neither the trial court decision nor the Virginia Supreme Court decision discuss or even mention the State Constitution. Also, all cases cited in the *Shiflet* and *Dillon* cases that deal with the due process argument are grounded exclusively in the *Federal*, not State, Constitution.

In any event, in Virginia, the Supreme Court has held that if an activity does not offend the Federal Constitution, then it will not offend the Virginia Constitution, and vice versa. *Reynolds v. Milk Comm'n*, 163 Va 957, 963, 179 S.E. 507 (1935).

the ones who somehow enjoy a "due process right" springing from their very negligent act.

Clearly, even when applying standards prior to the *Pension Benefit* and *Locke* cases, subsection (d) is constitutionally sound. The law everywhere and in Virginia until our decision, is that the legislature possesses the power to enact retrospective legislation, without constitutional prohibition, if the legislative intent is plainly manifest that the statute is to have such effect and it neither impairs contractual obligations nor destroys vested rights. 16A Am Jur.2d., *Constitutional Law,* Section 663, 664, 668 (cases too numerous to cite).

This is especially true in a situation like ours where the affected right was created by the legislature in the first place. Vol. 18 C.J.S., *Contribution,* Section 2. *Sutherland,* in his national treatise on statutory construction, discusses the ability of the legislature to alter *statutorily created* inchoate rights. Such rights, *Sutherland* emphasizes, "are by definition *not* vested rights such as escape the common law rule" allowing a divestment of all rights "accruing under" the statute. Vol. 1A, *Sutherland, Treatise on Statutory Construction,* Section 23.35 and 33 (cases too numerous to cite).

Here, Section 8.01-35.1 (d) is supported by a legitimate legislative purpose (eg. encouraging settlement of claims) furthered by rational means under the *Pension Benefit* and *Locke* analysis. Also, using traditional Constitutional principals, the statute is sound. First, the manifest intent of the legislature is clearly stated in subsection (d) itself. Second, the right to contribution is clearly not a contractual right. Vol 18 C.J.S., *Contribution,* Section 2. Third, is it a vested right? This, of course, is the argument advanced by Respondent at the trial court level but later dropped on appeal. The reason for this change of argument is because every reported decision that has ever considered that argument has rejected it. A vested right is defined as a right not dependent on any future act, contingency or decision to make it more secure. The right to contribution is not vested. Rather it is "contingent, subordinate, or inchoate". *Shiflet,* supra, 319 S.E2d at 754. Finally, it is a right created by the legislative body and, therefore, is subject to the will of

the legislature prior to vesting. As such, it can be retroactively altered by legislative expression without constitutional prohibition.

Finally, there is language in the decision below that indicates the Virginia Supreme Court erroneously pinned its due process violation holding on the fact that the statute "retroactively . . . . eliminates the long standing common law defense that the release of one joint tortfeasor releases all." (See Appendix at 6A). Any suggestion that this change deprives Respondent of a constitutionally protected right is simply wrong. Clearly, the retroactive elimination of a common law defense creates no due process violation whatsoever. In *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 57 L.Ed.2d 595, 98 S.Ct. 2620 (1978), this Court stated the long standing rule:

> **32.** Our cases have clearly established that "[a] person has no property, no vested interest, in any rule of the common law." *Second Employers' Liability Cases,* 223 U.S. 1, 50, 32 S.Ct. 169, 175, 56 L.Ed. 327 (1912), quoting *Munn v. Illinois,* 94 U.S. 113, 134, 24 L.Ed. 77 (1877). The "Constitution does not forbid the creation of new rights, or the abolition of old ones recognized by the common law, to attain a permissible legislative object," *Silver v. Silver,* 280 U.S. 117, 122, 50 S.Ct. 57, 58, 74 L.Ed. 221 (1929), despite the fact that "otherwise settled expectations" may be upset thereby. *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 16, 96 S.Ct. 2882, 2892, 49 L.Ed.2d 752 (1976).

438 U.S. at 88 n.32.

Indeed, prior to the enactment of subsection (d) the Virginia General Assembly studied whether or not the covenant not to sue statute could retroactively affect a defendant's right of contribution. The Attorney General of Virginia, in a written opinion to a member of the General Assembly, concluded that retroactivity of Section 8.01-35.1 would be constitutionally permissible since ". . . such application would disturb no vested

rights and would be in accord with the rules of statutory construction." A.G. Rep. 247 (1979) (See Appendix).

Petitioner's position is neither novel nor new. Conversely, the Supreme Court of Virginia in our decision has announced a position that not only ignores the two recent decisions of this Court but would radically alter time-honored principles. The decision should be overturned and the jury verdict reinstated.

2. The Virginia Supreme Court Should Not Have Applied This New Constitutional Principal To The Parties In This Case.

The Virginia Supreme Court has carved out a new constitutional standard to be applied when the state legislative body, by express mandate, retroactively alters a statutorily created inchoate right. This new standard has resulted in extreme prejudice to Petitioner, e.g. the dismissal of a claim against a joint tortfeasor who chose not to settle but to have a jury determine liability. Where such prejudice exists this Court has stated many times that the Court which has declared a new constitutional standard has a duty to decide whether retroactive or prospective application of the new standard is appropriate. See, for example, *Chevron Oil Co. v. Huson*, 404 U.S. 97 30 L.Ed.2d 296, 92 S.Ct. 349 (1971); *United States v. Johnson*, 457 U.S. 537, 102 S.Ct. 2579, 2587, n. 12 (1982).

Petitioner advanced the argument to the Virginia Court that the remedy urged by Respondent (dismissal) would be inequitable and unjust to the parties herein. Also, after the announcement of the new constitutional standard, Petitioner timely filed its Petition to Reconsider based upon, amongst other things, the analysis the Court enunciated in *Chevron*. That Petition was denied without opinion.

This Court in *Chevron* related three factors that should control a Court's decision concerning whether to apply a new constitutional rule only to future cases. First, this Court directs that "the decision . . . must establish a new principle of law, either by overruling clear past precedents on which litigants may have relied . . . or by deciding an issue of first impression

whose resolution was not clearly foreshadowed . . ." *Id.* at 355 (citation omitted). Second, the Court must consider whether retroactive application will "further retard" the operation of the new rule. *Ibid.* Finally, the Court must weigh any "inequity" that would be imposed by retroactive application. *Ibid.*

Applying these factors, a court may elect one of several options, ranging from complete retroactivity of the new standard, to application only to cases still pending, to a rule of "pure" prospectivity that " 'denies the benefits of the new rule event to the parties before the Court.' " *In re Twin Parks Limited Partnership,* 720 F.2d 1374, 1376 (4th Cir. 1983), *cert. denied,* 104 S.Ct. 1602 (1984) (quoting *United States v. Johnson, supra*).

When applying the *Chevron* criteria to our case, it is clear that a reversal and final judgment in favor of Respondent should not have been granted. First, the constitutional protection afforded statutorily created inchoate rights is a new principle of law whose resolution was certainly not clearly foreshadowed. As previously described, all cases, from Virginia and elsewhere, prior to the enactment of subsection (d) had consistently limited the constitutional protection of due process from retroactive alteration to vested not inchoate rights. Further, although the Court in our case refers to dicta in a 1984 Supreme Court case, that decision was rendered *after* Section 8.01-35.1 (d) was amended, *after* the parties executed a covenant not to sue, *after* the Trial Court denied the Respondent's Motion for Summary Judgment, *after* the trial of the non-settling defendant and during the pendency of our appeal.[5]

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[5] *Shiflet,* supra, only resolved an issue of statutory interpretation, not constitutional law. The covenant entered into in *Shiflet* pre-dated the express legislative intent for retroactivity found in sub-section (d). The constitutional issue was not even briefed in *Shiflet.* Specifically, that case held that the substantive right of contribution could not be *implicitly* retroactively impaired the 1979 version of Section 8.01-35.1 of the Virginia Code. Our factual context, unlike that in *Shiflet,* involved a covenant not to sue entered into eighteen months *after* the enactment of subsection (d)—the legislative expression giving the covenant not to sue statute retroactive effect. Considerations of due process were unnecessary to the decision in *Shiflet,* and the Court's comments about the limitations of due process were only dicta.

(footnote continues)

Continuing with the second factor of the *Chevron* analysis, the prospective application of the new constitutional protection statutes will not retard the operation of the new rule. By determining that the General Assembly did not have the legislative authority to retroactively alter inchoate, albeit substantive, rights of litigants by application of retroactive laws, the Virginia Supreme Court has now set a new and radically different legislative standard. It would not "retard" the new standard to apply it prospectively only. Indeed, prospectivity will provide the legislature and litigants with notice of the new standard so that the severe prejudice of unexpected dismissals, such as this, can be avoided.

Finally, when reviewing the equities of our situation, as *Chevron* directs, it is clear that the remedy afforded Respondent is inequitable and unjust. The Supreme Court of Virginia, after announcing its new constitutional principal, allowed the Respondent to escape any responsibility for its tort by applying the rule that release of one joint tortfeasor releases all. Thus, the claim against the Hospital was dismissed.

Employing the remedy of dismissal in this case is illogical. The "release of one releases all" rule was based upon the old English rule that a plaintiff could only obtain one judgment per tort, because the acts of one were considered to be the acts of all. Prosser, *Law of Torts*, Section 46 (4th Ed. 1971). However, because the fact that one joint tortfeasor was liable for *all* of the damage done, regardless of his degree of fault, there emerged the doctrine of contribution.

Therefore, with the Respondent enjoying the statutory right of contribution that a tortfeasor enjoys in Virginia, application of the "rule" is inequitable. The Respondent

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(footnote continued)

In any event, the "precedent" which the Court relied upon in *Shiflet* to elevate the right of contribution beyond its inchoate nature was adopted from a 1951 Delaware Superior Court case that has been overruled by that state's Supreme Court since 1958! See *Halifax Chick Express Inc. v. Young*, 137 A.2d 743 at 744-45 (Del. Supreme Ct. 1958) and *Perez v. Shortline, Inc.*, 231 A.2d 642 at 644 (Del. Superior Ct. 1967), overruling *Distefano v. Lamborn* 81 A.2d 675 (1951). The *Shiflet* decision cited *Distefano* but ignored the cases that overruled it.

should not be afforded the *benefit* of the "rule" because the *basis* for the rule (one joint tortfeasor is liable for all the damage done) simply doesn't exist under the covenant not to sue statute. Indeed, the Respondent requested and received from the trial court a credit of $475,000—the amount Petitioner settled for from the released joint tortfeasor.

For these reasons, the new rule announced in our case is not only unsound legally but it is also inequitable and unjust and should be treated "purely" prospectively. That is, the new constitutional standard should not apply to the parties in our case so as to allow Respondent to totally escape it's tortious conduct.

3. Since Respondent Claimed And Accepted Benefits Under Section 8.01-35.1, Code of Virginia, It Should Be Estopped From Claiming That Statute Is Unconstitutional.

As the dissent recognized in our case, the record below clearly shows Respondent took alternate positions in the Trial Court regarding the covenant not to sue statute. First, it claimed the statute was unconstitutional. This motion was overruled. Having been denied that relief, Respondent then argued that it was entitled to a credit of $475,000 against the verdict as provided by the same statute. This motion was granted. This Court long ago held that a litigant who takes advantage of the benefits conferred by a statute should not be heard to question its constitutionality in order to avoid its burdens. *Buck v. Kuykendall,* 267 U.S. 307 (1925).

The Respondent, by requesting and receiving its statutory right to contribution conferred by Section 8.01-35.1, to-wit: the $475,000 credit, has relinquished not only its ability to contest the constitutionality of the statute, but also it has given up any future right to contribution that it may have had prior to the statutes enactment. The Respondent has claimed the statutes benefit and, by the terms of Section 8.01-35.1 (2), it is precluded from seeking contribution from any other tortfeasor. To allow Respondent to accept the benefit of the statute, and not its burden, is contrary to settled law.

CONCLUSION

For these reasons, a writ of certiorari should be issued to review the judgment and opinion of the Virginia Supreme Court.

Respectfully submitted,

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APPENDIX A

Record No. 840438

PRESENT: ALL THE JUSTICES
POTOMAC HOSPITAL CORPORATION

v.

JOSEPHINE A. DILLON, COMMITTEE
OF HILDA NADINE AMIDON

OPINION BY JUSTICE ROSCOE B. STEPHENSON, JR.

April 26, 1985

FROM THE CIRCUIT COURT OF PRINCE WILLIAM COUNTY

H. SELWYN SMITH, JUDGE

In 1982, the General Assembly amended Code § 8.01-35.1 [1] (the covenant-not-to-sue statute) by adding subsection D which provides that the statute "shall apply to all . . . covenants not to sue executed on or after July 1, 1979, and to all releases executed on or after July 1, 1980, regardless of the date the causes of action affected thereby accrued. Acts 1982, c. 196. The principal question in this appeal is whether this provision violates constitutional due process when retroactive application of the statute adversely affects a joint tort-feasor's substantive right of contribution.

[1] Code § 8.01-35.1 presently provides:

> Effect of release or convenant not to sue in respect to liability and contribution.—A. When a release or a covenant not to sue is given in good faith to one of two or more persons liable in tort for the same injury, or the same property damage or the same wrongful death:
>
> 1. It shall not discharge any of the other tort-feasors from liability for the injury, property damage or wrongful death unless

(footnote continues)

This is a medical malpractice case arising out of a surgical operation performed on Hilda Amidon at Potomac Hospital Corporation on September 16, 1977. During the operation, Amidon suffered a cardiac arrest and sustained severe, permanent brain damage.

In January 1980, Amidon's committee, Josephine Dillon, sued the hospital and three physicians, jointly and severally. On July 14, 1983, Dillon agreed to settle her claims against the physicians for $475,000. Pursuant to Code § 8.01-35.1, she executed a covenant not to sue, thereby releasing the physicians and purporting to reserve her claims against the hospital.

Before trial, the hospital moved for summary judgment on the ground that release of one joint tort-feasor releases all others. The hospital contended that because the cause of action accrued before the statute's effective date, application of Code § 8.01-35.1 to the cause of action unconstitutionally destroyed its right of contribution from the released tort-feasors.

(footnote continued)

its terms so provide; but any amount recovered against the other tort-feasors or any one of them shall be reduced by any amount stipulated by the covenant or the release, or in the amount of the consideration paid for it, whichever is the greater. A release or covenant not to sue given pursuant to this section shall not be admitted into evidence in the trial of the matter but shall be considered by the court in determining the amount for which judgment shall be entered; and

2. It shall discharge the tort-feasor to whom it is given from all liability for contribution to any other tort-feasor.

B. A tort-feasor who enters into a release or covenant not to sue with a claimant is not entitled to recover by way of contribution from another tort-feasor whosse liability for the injury, property damage or wrongful death is not extinguished by the release or covenant not to sue, nor in respect to any amount paid by the tort-feasor which is in excess of what was reasonable.

C. A release or covenant not to sue given pursuant to this section shall be subject to the provisions of §§ 801.55 and 8.01-424.

D. This section shall apply to all such covenants not to sue executed on or after July 1, 1979, and to all releases executed on or after July 1, 1980, regardless of the date the causes of action affected thereby accrued.

The trial court reserved its ruling on the motion and a jury trial to determine liability and damages ensued. The hospital unsuccessfully moved to strike the evidence and enter summary judgment at the conclusion of Dillon's evidence and again after all the evidence was presented. The jury returned a $1,200,000 verdict for Dillon.

The trial court refused to set aside the verdict, but it did grant a $475,000 credit to the hospital for the amount the physicians had paid. The court entered judgment for $725,000 against the hospital. In rejecting the hospital's argument respecting the retroactive application of Code § 8.01-35.1, the court opined that the hospital's right to contribution was inchoate, not vested, and that "inchoate rights are subject to alteration or destruction by legislative enactment at any time prior to their vesting."

As a threshold issue, Dillon contends that the hospital is estopped from challenging the constitutionality of Code § 8.01-35.1 because it benefited from the statute by receving the $475,000 credit against the verdict. She relies upon *Bisping and Exum* v. *Commonwealth*, 218 Va. 753, 240 S.E.2d 656 (1978), *cert. denied*, 435 U.S. 1007 (1978), and *Spindel* v. *Jamison*, 199 Va. 954, 103 S.E.2d 205 (1958). Her reliance is misplaced.

In *Bisping*, the defendant voluntarily availed himself of the advantages of the recognizance statute and later claimed the statute was unconstitutional. We held that "one who voluntarily proceeds under a statute and claims benefits thereby conferred will not be heard to question its constitutionality in order to avoid its burdens." *Bisping*, 218 Va. at 755, 240 S.E.2d at 657.

Similarly, in *Spindel*, the Plaintiff's application for a professional engineer's license pursuant to a specific statute was denied, and thereafter he attacked the statute's constitutionality. We said that "[n]o litigant will be heard to deny the validity of a statute under which he has chosen to proceed." *Spindel*, 199 Va. at 960, 103 S.E.2d at 210.

Here, however, the hospital did not request the application of Code § 8.01-35.1. To the contrary, it vigorously challenged

its application throughout the trial. After the court had rejected the hospital's contention and applied the statute, the credit provision of the statute automatically came into play. Consequently, we reject this contention.

Next, we address the constitutional question. The hospital contends, as it did at trial, that subsection D is unconstitutional. Relying primarily upon *Shiflet* v. *Eller,* 228 Va. 115, 319 S.E.2d 750 (1984), decided after the trial court ruled in the present case, it argues that the right of contribution by one joint tort-feasor from another is a "substantive" right which is "constitutionally protected against retroactive statutory abridgement."

On the other hand, Dillon asserts that Code § 8.01-35.1 can be retroactively applied in the instant case. She argues that a cause of action for contribution between joint tort-feasors is inchoate and contingent and that "[i]t ripens into a right to sue to recover only after one tortfeasor [sic] has paid a disproportionate share of damages arising out of a common obligation." She further asserts that Code § 8.01-35.1 merely altered the method of recovering contribution; it did not destroy the right of contribution.

Dillon acknowledges that the statue did not apply to causes of action arising before the date of its enactment because the General Assembly, in Code § 8.01-1,[2] expressly prohibited such application. She asserts, however, that by enacting subsection D of Code § 8.01-35.1, the General Assembly specifically expressed its intention to allow the statute's application

---

[2] Code § 8.01-1 reads as follows:

How proceedings may be in actions pending when title takes effect.—Except as may be otherwise provided in § 8.01-256 of Chapter 4 (§ 8.01-228 et seq.) (Limitations of Actions), all provisions of this title shall apply to causes of action which arose prior to the effective date of any such provisions; provided, however, that the applicable law in effect on the day before the effective date of the particular provisions shall apply if in the opinion of the court any particular provision (i) may materially change the substantive rights of a party (as distinguished from the procedural aspects of the remedy) or (ii) may cause the miscarriage of justice.

"regardless of the date the causes of action affected thereby accrued," thereby abrogating Code § 8.01-1. Dillon further asserts that the right of contribution, though substantive, is neither a vested nor a contractual right; thus, it can be altered retroactively without constitutional prohibition.

We conclude that *Shiflet* controls. In *Shiflet*, as here, the tort occurred in 1977, before the enactment of Code § 8.01-35.1, which took effect July 1, 1979. In a document executed in 1981, pursuant to Code § 8.01-35.1, the Shiflets released one joint tort-feasor but purported to reserve all claims against Eller, the other joint tort-feasor. When the Shiflets sued Eller, the trial court sustained Eller's plea of release, and we affirmed.

In *Shiflet*, we held that both "substantive" rights and "vested" rights "are included within those interests protected from retroactive application of statutes." 228 Va. at 120, 319 S.E.2d at 753. We further held that Eller's cause of action for contribution, which arose at the time of the tort,[3] "is a substantive right manifested by the ability of one tort-feasor to seek contribution from another wrongdoer jointly liable and by the ability of a joint wrongdoer to defend successfully a suit by the plaintiff after the plaintiff has released another joint tort-feasor." *Id.* at 121, 319 S.E.2d at 754.

Finally, in *Shiflet* we said what is most signficant to the present case:

> Because the cause of action for contribution accruing to Eller, a joint tort-feasor, arose at the time of the jointly negligent acts . . . , it necessarily follows that the 1979 statute in question, which adversely affects that substantive right, cannot be applied retroactively to impair that right . . . . Such a retroactive application of the enactment *would violate Eller's due process rights and would be invalid.*

---

[3] In *Shiflet*, we distinguished between a "cause of action" and a "right of action." The former "arises at the time of the jointly negligent acts" while the latter arises only when one joint tort-feasor has paid a claim for which other joint tort-feasors are also liable. *Id.* at 120-21, 319 S.E.2d at 754.

Id. at 121, 319 S.E.2d at 754 (emphasis added) (citations omitted). Thus, *Shiflet* holds that because the retroactive application of Code § 8.01-35.1 adversely affects the "substantive" right of contribution, such an application would violate a joint tort-feasor's due process rights. Additionally, such retroactive application of the statute eliminates the long-standing common-law defense that the release of one joint tort-feasor releases all.

Dillon seeks to distinguish the present case from *Shiflet*, noting that the release in *Shiflet* predated the enactment of subsection D of Code § 8.01-35.1, while in the present case, Dillon's covenant not to sue was executed after the enactment of subsection D. She asserts that *Shiflet* was controlled by Code § 8.01-1, but that subsection D abrogated Code § 8.01-1, thereby removing the prohibition against the statute's retroactive application. Dillon, however, ignores the language in *Shiflet* which clearly states that the retroactive application of a statute impairing a "substantive" right violates due process and is therefore unconstitutional. *Id.; see also Sargent Electric Co.* v. *Woodall*, 228 Va. 419, 425, 323 S.E.2d 102, 105 (1984).

Finally, Dillon contends that we should repeal the rule which provides that the release of one joint tort-feasor releases all. While acknowledging that this was the law in the Commonwealth before Code § 8.01-35.1, she asserts, nonetheless, that repeal is warranted because the rule is unjust and inequitable. We also reject this contention.

In *Wright* v. *Orlowski*, 218 Va. 115, 122-23, 235 S.E.2d 349, 354 (1977), we said: "Unfortunately, the rule sometimes works harsh results. Yet, the rule is one of ancient origin, honored without exception in this Commonwealth, and fully familiar to bench and bar. Both counsel and courts must be governed by it." Because this rule was established law at the time of the alleged malpractice when the rights and obligations of the parties were determined, *Shiflet*, 228 Va. at 123, 319 S.E.2d at 755; *Norfolk & Sou. R. Co.* v. *Beskin*, 140 Va. 744, 747, 125 S.E. 678, 679 (1924), it would be improper for us to retroactive repeal the rule under the guise of promoting equity. Unless litigants can rely upon established rules, there will be no stability in the law.

Thus, we hold that Code § 8.01-35.1 cannot be applied retroactively to adversely affect the hospital's right of contribution, and, therefore, pursuant to the established law at the time the cause of action accrued, the trial court erred in denying the hospital's motion for summary judgment. *See Wright* v. *Orlowski*, 218 Va. 115, 235 S.E.2d 349 (1977). Accordingly, we will reverse the judgment of the trial court and enter final judgment for the hospital.

Reversed and final judgment.

Record No. 840438

POTOMAC HOSPITAL CORPORATION

v.

JOSEPHINE A. DILLON, COMMITTEE
of HILDA NADINE AMIDON

RUSSELL, J., DISSENTING:

I think the hospital is estopped from challenging the constitutionality of Code § 8.01-35.1. As the majority opinion points out, one who claims and accepts the benefits conferred by a statute "will not be heard to question its constitutionality in order to avoid its burdens." *Bisping and Exum* v. *Commonwealth,* 218 Va. 753, 755, 240 S.E.2d 656, 657 *cert. denied,* 435 U.S. 1007 (1978); *Spindel* v. *Jamison,* 199 Va. 954, 960, 103 S.E.2d 205, 210 (1958). That is precisely the situation in which the hospital placed itself.

The majority opinion states that after the trial court had rejected the hospital's claim of unconstitutionality, the hospital did not invoke the benefits of the statute, so as to become estopped, because "the credit provision of the statute automatically came into play." I do not so interpret the record.

The hospital filed a post-trial motion, supported by a memorandum of law, moving the court (1) to reduce the $1,200,000.00 verdict to $750,000.00 pursuant to the statutory "cap" on malpractice awards provided by Code § 8.01-581.15, and (2) further to reduce the remaining $750,000.00 by $475,000.00 "pursuant to Va. Code § 8.01-35.1 (1983 Cum. Supp.)." In oral argument on the motion, counsel for the hospital said:

> Your Honor, you have a verdict of a million, two, which should be reduced to $750,000, because that's what the statue says is recoverable. And [8.01-] 35.1

> says that you should, from that amount that is to be recovered under [8.01-] 581.15, deduct $475,000, and leave the amount to be recovered $275,000, which means that the full effect of the statute is given . . . .

The court refused to apply the statutory "cap," but did apply Code § 8.01-35.1, the very statute the hospital attacks as unconstitutional, by granting the hospital's motion to the extent of crediting the $1,200,000 verdict with the $475,000 settlement the plaintiff had made with the physicians.

The hospital, therefore, specifically asked for and received the benefits conferred upon it by Code § 8.01-35.1 and, in my view, is estopped from any challenge to its constitutionality.

APPENDIX B

MEMORANDUM OPINION ISSUED BY THE TRIAL COURT DECEMBER 16, 1983

MEMORANDUM OPINION

SUBJECT: POTOMAC HOSPITAL CORPORATION'S MOTION FOR SUMMARY JUDGMENT

This suit was brought by Josephine A. Dillon, Committee of Hilda Nadine Amidon, against Potomac Hospital Corporation, alleging negligence of the hospital, its agents and employees in rendering medical services to Miss Amidon. The events which gave rise to this suit occurred on or about September 16, 1977. Plaintiff filed her Amended Motion for Judgment on April 27, 1982. Named as defendants were Potomac, Dr. Mehdi Jandaghi, Dr. James Kent, Mr. William Moss and Darwyn H. Lesh, Administrator for the Estate of Dr. Soccoro Tamase. A non-suit was granted as to Mr. Moss, on July 14, 1983. Plaintiff, in consideration of $475,000, entered into a covenant not to sue with Dr. Jandaghi, Dr. Kent and Mr. Lesh. By the terms of that agreement, the named defendants, save for Potomac, were released from liability. On August 12, 1983, Potomac moved for summary judgment pursuant to Rule 3:18 Va. Rules of Court.

In its motion for summary judgment, Potomac contends that the covenant not to sue released Potomac as well as their co-defendants named therein. It is conceded by Potomac that enactment of Section 8.01-35.1 of the Code of Virginia in July of 1979, abrogated the common law doctrine, previously followed in Virginia, that release of one defendant released all. However, Potomac contends that the law to be applied in this case is the law as it existed on the day of Potomac's alleged negligence in 1977. To do otherwise would, in Potomac's opinion, destroy its right to contribution from the released defendants. This right, claims Potomac, cannot be taken away dispite subsection D of Section 8.01-35.1 which provides that the statute shall apply to all covenants not to sue and releases executed after its enactment "regardless of the date the causes of action affected thereby accrued."

In addition, Potomac is unwilling to concede that Section 8.01-35.1 was intended to change the prior rule that where an

employer's liability is based solely on the theory of respondent superior, release of the employee co-defendant releases the employer as well.

For the reasons set forth below, I find neither of Potomac's theories for non-application of Section 8.01-35.1 convincing.

In arguing that Section 8.01-35.1 should not be applied in the instant case, Potomac relies heavily on *Carickhoff* v. *Badges-Northland Inc.*, 562 F. Supp. 160 (W.D. Va. 1983). There Judge Michael ruled that application of Section 8.01-35.1 to a cause of action which arose prior to enactment of the statute would destroy the non-released defendant's pre-existing substantive right to contribution. According to Judge Michael this would constitute a deprivation of due process under the United States Constitution.

However, *Carickhoff* is only one of three opinions rendered to date on the retroactive application of Section 8.01-35.1. None of the opinions rendered are binding on this court, but it is worthy of note that the two other opinions on this point have upheld the constitutionality of applying Section 8.01-35.1 to a cause of action which arose prior to the statute's enactment. As plaintiff has pointed out, the Attorney General of Virginia gave an advisory opinion on this very point in May of 1979. He concluded that ". . . . such an application would disturb no vested rights and would be in accord with the rules of statutory construction." A.G. Rep. 247 (1979). In addition, it has been held that courts interpreting Section 8.01-35.1 and its amendments "must look to the date of the release rather than the date that the cause of action arose in order to determine the applicable statute." *Statzer* v. *King Kutter Corp.*, 550 F. Supp. 1062, 1065 (W.D. Va. 1982).

After reviewing these opinions and Potomac's contentions, I must respectfully disagree with the decision reached in *Carickhoff*. Initially, it is noted that all statutes are presumed constitutional and should be interpreted so as to comply with constitutional mandates. M. J. *Statutes* Section 56. While it is true that no statute may be applied retroactively if to do so would disturb contractual or vested property rights, "mere matters of procedure and remedy for their enforcement and

preservation may at the will of the Legislature be altered, curtailed or repealed so long as reasonable opportunity and time are afforded to enforce and preserve such rights." *Duffy* v. *Hartsock*, 187 Va. 406, 46 S.E.2d 570, 574 (Va. 1948). Also applied in *Stroobants* v. *State Highway Commissioner*, 209 Va. 275 (1968) and *Creteau* v. *Phoenix Assurance Co.*, 202 Va. 641 (1961).

The right asserted here, Potomac's right to contribution, was neither vested before enactment of Section 8.01-35.1 nor disturbed by that statute. It is well settled that before payment is actually made by one co-defendant, the right to contribution is an incohate rather than a vested right. *Nationwide Insurance Co.* v. *Minnifield*, 213 Va. 797, 799 (1973), 18 Am. Jur. 2d *Contribution* Section 46. It is equally well settled that incohate rights are subject to alteration or destruction by legislative enactment at any time prior to their vesting. *Turner* v. *Turner*, 185 Va. 505 (1946). This principle does not violate the United States Constitution. *Jackson* v. *National Linen Service Corp.*, 248 F. Supp. 962 (W.D.Va. 1965).

Furthermore, a careful reading of Section 8.01-35.1 reveals that the right to contribution, whatever its character, has not been disturbed. All that happened is that the Legislature had provided a new procedure for its enforcement. It is true that the statute specifically states in Subsection A-2 that a covenant not to sue or release "shall discharge the tort feasor to whom it is given from all liability for contribution to any other tort feasor." However, it is earlier stated in Subsection A-1 that "any amount recovered against the other tort feasors or any one of them shall be reduced by any amount stipulated by the covenant or the release or in the amount of the consideration paid for it whichever is the greater."

Thus legislature has provided a more stream-lined method of computing contribution. Rather than having one tort feasor pay the plaintiff then seek contribution from fellow tort feasors, Section 8.01-35.1 simply allows the amount of the judgment to be reduced by what the plaintiff has already received as compensation. The policy behind the right to contribution is thereby preserved and no vested rights are impaired. While this method may alter the proportional share each tort feasor

will ultimately contribute, it has been held that statutes which merely alter the potential amount of recovery are not unconstitutional. *Karl v. Bryant Air Conditioning Co.*, 705 F.2d 164 (6th Cir. 1983).

Turning now to Potomac's second objection to applying Section 8.01-35.1 it contends that aside from the issue of retroactivity Section 8.01-35.1 should not be applied here because it was not meant to alter the common law rule that release of an employee releases the employer. In support of this contention Potomac cites authority from other jurisdictions which have interpreted statutes similar to Section 8.01-35.1. There is no Virginia case on point, however, in the case of *Harris v. Aluminum Company of America*, 550 F. Supp. 1024 (W.D. Va. 1983) Judge Turk confronted this issue. He held that "a covenant not to sue given to an alleged agent pursuant to Va. Code Section 8.01-35.1 does not automatically release the alleged principal from vicarious liability based on the acts of the alleged agent." 550 F. Supp. at 1030. Applying the "act's plain language" Judge Turk concluded that it "appears to apply to a party who is vicariously liable as the act's coverage extends to 'one of two or more persons liable in tort for the same injury.'" 550 F. Supp. at 1030. In addition, he found "no evidence that the Virginia General Assembly intended to exclude the vicarious liability of masters or principals from the scope of Virginia's covenant act." 550 F. Supp. at 1030.

I am persuaded by Judge Turk's reasoning and agree with him that Section 8.01-35.1 applies in cases of vicarious liability such as this.

Accordingly, Potomac's motion for summary judgment was denied.

H. SELWYN SMITH, Judge

APPENDIX C

Record No. 840438
Circuit Court No. L-10472

POTOMAC HOSPITAL CORPORATION,
Appellant,

against

JOSEPHINE A. DILLON, COMMITTEE, *etc.*,
Appellee.

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday the 14th day of June, 1985.

UPON A PETITION FOR REHEARING

On consideration of the petition of the appellee to set aside the judgment rendered herein on the 26th day of April, 1985, and grant a rehearing thereof, the prayer of the said petition is denied.

A Copy,

Teste:

Clerk

APPENDIX D

REPORT OF THE ATTORNEY GENERAL

STATUTES. RETROACTIVE APPLICATION. STATUTE PROVIDING THAT GIVING OF COVENANT NOT TO SUE DOES NOT DISCHARGE OTHER TORT FEASORS MAY BE APPLIED TO COVENANT EXECUTED AFTER EFFECTIVE DATE OF STATUTE BUT INVOLVING CLAIM FOR PERSONAL INJURY WHICH AROSE BEFORE THAT DATE.

May 29, 1979

The Honorable George E. Allen, Jr.
Member, House of Delegates

You ask about the retroactive application of a statute providing that the giving of a "covenant not to sue" does not discharge other tort feasors. The statute, § 8.01-35.1 of the Code of Virginia (1950), as amended,[1] was enacted by the General Assembly during its 1979 Session, to take effect July 1, 1979. You ask whether it would be applicable to a covenant not to sue executed after the effective date of the statute, July 1,

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[1] Section 8.01-35.1 provides the following:

"*Covenants not to sue and right to contribution.* A. When a covenant not to sue is given in good faith to one of two or more persons liable in tort for the same injury or the same wrongful death:

1. It shall not discharge any of the other tort feasors from liability for the injury or wrongful death unless its terms so provide; but it shall reduce the claim against the others to the extent of any amount stipulated by the covenant, or in the amount of the consideration paid for it, whichever is the greater; and

2. It shall discharge the tort feasor to whom it is given from all liability for contribution to any other tort feasor.

B. A tort feasor who enters into a settlement with a claimant is not entitled to recover contributions from another tort feasor whose liability for the injury or wrongful death is not extinguished by the settlement, nor in respect to any amount paid in a settlement which is in excess of what was reasonable."

1979, and which involved a claim for personal injury arising out of an automobile collision which had occurred before that date.

I am of the opinion that the new statute would be applicable in the case you present since such an application would disturb no vested right and would be in accord with the rules of statutory construction.

This statute changes the existing law on two points. Presently, when a plaintiff effects an accord and satisfaction with one tort feasor, his claim against the others responsible for his injuries is also discharged—whether or not the plaintiff attempts to reserve the right to sue the others and whether the transaction is styled a covenant not to sue or a release. *Shortt v. Hudson Supply and Equipment Co.*, 191 Va. 306, 313, 60 S.E.2d 900, 904 (1950). The law also now provides that, "Contribution among wrongdoers may be enforced when the wrong results from negligence and involves no moral turpitude." *See* § 8.01-34. No special rule is provided for cases involving a covenant not to sue.

It is clear, of course, that retrospective application of the statute would not be allowed if it were to destroy or impair vested rights. This principle was clearly set forth in *Duffy v. Hartsock*, 187 Va. 406, 416, 46 S.E.2d 570, 574 (1948). In defining what is meant by the term "vested right," the court has said that it is "a right so fixed that it is not dependent on any future act, contingency or decision to make it more secure." *Kennedy Coal Corp. v. Buckhorn Coal Corp.*, 140 Va. 37, 45, 124 S.E. 482, 484 (1924).

In the case of a covenant not to sue, it is the satisfaction of plaintiff's claim by a wrongdoer which extinguishes the liability of others responsible for the same injury—and not the form of the instrument. *Shortt, supra*, 191 Va. at 313. Therefore, until such time as satisfaction is actually made, the discharge of a tort feasor remains contingent upon a future event and cannot be considered vested. Consequently, the application of § 8.01-35.1 to a covenant executed after July 1, 1979, cannot be said to disturb any vested right of discharge—even where the covenant applies to a cause of action which arose before that date.

Likewise, the right of contribution arises only when one tort feasor has paid or settled a claim for which other wrongdoers are also liable. *Bartlett v. Roberts Recapping, Inc.*, 207 Va. 789, 793, 153 S.E.2d 193, 196 (1967). Until such payment or settlement has been made, the right of contribution remains a mere possibility, dependent upon a future contingency in order for it to vest. Therefore, if a covenant is not executed until after July 1, 1979, no right of contribution could accrue therefrom until after the effective date of the new legislation. Consequently, the application of the statute to convenants executed after that date would in no way disturb vested rights of contribution, regardless of when the cause of action arose.

I am also of the opinion that such an application of § 8.01-35.1 is in accord with the rules of statutory construction. In Virginia, it has been a generally accepted rule that "remedial statutes are not retrospective in their application in the absence of clear legislative intent." *Phipps, Adm'r* v. *Sutherland*, 201 Va. 448, 452, 111 S.E.2d 422, 425 (1959). Admittedly, no such intent was expressed by the General Assembly when it enacted § 8.01-35.1; but this point does not settle the question because the *Phipps* rule does not apply in every instance.

In *Walke* v. *Dallas, Inc.*, 209 Va. 32, 36, 162 S.E.2d 722, 724-725 (1968), the court stopped short of overrruling *Phipps*, but nevertheless decided that the long arm statutes then before it "are not the type to which the [Phipps] rule applies. They create no new cause of action and take away no existing right or remedy. They only provide a forum for asserting an existing right." In my opinion, § 8.01-35.1 is also the type of statute to which the *Phipps* rule does not apply. It is excluded from the operation of this rule for reasons similar to those for which the long arm statutes were excluded.

Like the long arm statutes, § 8.01-35.1 creates no new cause of action and takes away no existing rights. While the new law does not provide plaintiffs with a *new forum*, it nevertheless provides them with a *new method* by which they may pursue their claims. In both cases, the statutes only operate in furtherance of the remedy of rights already existing. It is my opinion that this degree of similarity with the long arm

statute is sufficient to include § 8.01-35.1 in the category of those statutes to which the *Phipps* rule does not apply.

I am also of the opinion that the application of the new statue to covenants executed after July 1, 1979, is not prevented by § 1-16. This section provides:

> "No new law shall be construed to repeal a former law, as to . . . any right accrued, or claim arising under the former law, or in any way whatever to affect . . . any right accrued, or claim arising before the new law takes effect; . . . "

It could be argued that the new statute would "affect" a personal injury claim arising before July 1, 1979, if it enabled that claim to survive a covenant which would otherwise discharge it. But the better view, in my opinion is that the new statute would not affect the claim itself, but would merely affect the covenant so as to alter the consequences which such a subsequent, collateral event would have upon the claim.

In support of this view, I would cite the court's decision in *Hurdle & Foelak* v. *Prinz & Meihm,* 218 Va. 134, 235 S.E.2d 354 (1977). In that case, personal injury causes of action accrued while the plaintiffs were still minors and before the operative date of the 1972 statute lowering the age of majority. The plaintiffs contended that, under §1-16, the law in force at the time their claims accrued controlled the date from which the statute of limitations commenced to run on their right to sue. Consequently, they argued, the new age of majority statute could not be applied so as to reduce the time within which their suits could be filed. The court rejected this view, declaring:

> "The statute affecting limitations here (citations omitted) are of the remedy only and procedural; the plaintiffs acquired no vested right therein at the time their causes of action accrued. Consequently . . . the portions of §1-16 relied on by the plaintiffs have no application to this case . . . ."

The implications of this decision are clear. In the *Hurdle* case, restricting the remedy by which plaintiffs' claims could be

pursued was not equivalent to affecting the claims themselves in violation of §1-16. Similarly, in the case you present, expanding to remedies available to a plaintiff in pursuing his claim must be distinguished from affecting the claim itself. Section 8.01-35.1 expands the remedy available in personal injury cases, but leaves the claim unaltered. Consequently, §1-16 is not relevant to the question you present.

For the foregoing reasons, I am of the opinion that § 8.01-35.1 would apply in personal injury cases to covenants executed after July 1, 1979, even where the cause of action arose before that date.

Supreme Court, U.S.
FILED
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No. 85-388

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

JOSEPHINE A. DILLON, Committee of
HILDA NADINE AMIDON, a legally incompetent person,
Petitioner,

v.

POTOMAC HOSPITAL CORPORATION,
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

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QUESTIONS PRESENTED

1. Whether this case involves a question of federal law?

2. Whether an adequate and independent state law ground exists for the decision below?

3. Whether a substantial question of federal law is involved in this case?

4. Whether the issues presented in this case are sufficiently important to merit review by this Court?

5. Whether the decision below was correct?

6. Whether the Virginia Supreme Court's decision that Respondent was not estopped from challenging the constitutionality of the state statute is a matter of state law?

LISTING PURSUANT TO RULE 28.1

Potomac Hospital Corporation is now Potomac Hospital Corporation of Prince William. It is a subsidiary of Potomac Health Care Corporation, which has the following subsidiaries in addition to Potomac Hospital Corporation of Prince William:

Potomac Hospital Properties

Potomac Development Corporation of Prince William

Potomac Hospital Services Corporation

Medical Center of Stafford, Inc.

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POTOMAC HOSPITAL CORPORATION,
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

The Respondent, Potomac Hospital Corporation, respectfully requests that the Petition for a Writ of Certiorari to the Supreme Court of Virginia be denied by this Court.

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of Virginia, Art. I, § 11:

> That no person shall be deprived of his life, liberty, or property without due process of law . . . .

STATEMENT OF THE CASE

Respondent states that the facts pertinent to this Petition for a Writ of Certiorari are adequately set forth by the

Supreme Court of Virginia in *Potomac Hospital Corporation v. Dillon*, 229 Va. ____, 329 S.E.2d 41 (1985) (hereafter referred to as *Dillon*).

Petitioner's statement that the jury found the hospital negligent is incorrect. The jury awarded damages against the hospital on the ground that it was liable *respondeat superior* for the actions of Dr. Tamase, for whose negligence Petitioner received satisfaction by settlement, and who was released by Petitioner along with the other defendants prior to trial.

Petitioner's statement that a majority of the Virginia Supreme Court held that § 8.01-35.1(D) violates due process of law is also incorrect. All of the Justices joined in the opinion save Justice Russell, whose dissent was limited to the issue of estoppel.

SUMMARY OF ARGUMENT

1. The Supreme Court of Virginia relied in this case entirely upon long established principles of Virginia law. The analysis of the issues by the Supreme Court of Virginia, and the cases cited by it, rest on doctrines of Virginia constitutional and common law. No federal question is involved in this case.

2. If the Virginia Supreme Court also relied upon principles of federal constitutional law, it is clear from the face of opinion that principles of Virginia common law and constitutional law were the primary grounds. There is an adequate and independent state law ground for the decision below.

3. The constitutional law applied in this case by the Virginia Supreme Court presents no novel issue. Accordingly, there is no substantial question of federal law involved.

4. The issues in this case ultimately turn upon principles of common law unique to the Commonwealth of Virginia.

Petitioner has cited no conflict among the decisions of the federal circuits, or conflicts among state courts of last resort. The *Dillon* decision does not involve an important question of unsettled federal law nor one decided in a way conflicting with applicable decisions of this Court. The issue presented is not sufficiently important to merit review by this Court.

5. It is well established that the legislature may not impair vested or accrued substantive rights by retroactive legislation. The Virginia General Assembly in the present case retroactively eliminated the right of contribution among joint tortfeasors and the common law defense that release of one joint tort-feasor releases all. These rights had accrued to the Respondent at the time of the incident and the Virginia Supreme Court was plainly correct in holding that they could not, by later legislation, be retroactively abrogated.

6. The Virginia Supreme Court's decision that Respondent was not estopped from challenging the constitutionality of the statute is dependent entirely upon principles of state law and involves no federal question. Petitioner relied solely upon state law principles in arguing this issue before the Virginia Supreme Court and has waived any federal question it might now seek to assert. The decision of the Supreme Court was correct in holding that the Respondent was not estopped from challenging the validity of the statute.

REASONS FOR DENYING THE WRIT

1. No Question Of Federal Law Is Involved In This Case.

The Supreme Court of Virginia held in *Dillon* that a retroactive abrogation of substantive common law rights of

joint tort-feasors by the Virginia General Assembly violated due process of law.

Petitioner invokes the jurisdiction of this Court upon its assertion that the validity of a state statute has been drawn into question as being repugnant to the United States Constitution. *See* 28 U.S.C. § 1257(3). The Supreme Court of Virginia, however, held in *Dillon* that the statute in question, § 8.01-35.1(D) of the Code of Virginia, was unconstitutional upon well established principles of Virginia law and not on the ground that it violated the United States Constitution. *Dillon*, and each of the cases it cited and relied upon, interpreted and applied principles of Virginia law that are independent of federal constitutional jurisprudence. As the decision below rested entirely upon doctrines of common law and state constitutional law, no federal question is presented.

The Supreme Court of Virginia framed the central issue in this case as follows:

> [W]hether this provision [§ 8.01-35.1] violates constitutional due process when retroactive application of the statute adversely affects a joint tort-feasor's substantive right of contribution.

Dillon, 229 Va. at ____, 329 S.E.2d at 43.

In deciding this issue, the Supreme Court of Virginia cited and relied upon its settled jurisprudence in the area of retroactivity, and not on principles of federal law.

Chief among the cases relied on in *Dillon* was *Shiflet v. Eller*, 228 Va. 115, 319 S.E.2d 750 (1984), where the Virginia Supreme Court held that § 8.01-35.1 could not be applied retroactively. In *Shiflet*, the Supreme Court of Virginia stated:

> [T]he 1979 statute in question, which adversely affects that substantive right [of contribution between tort-feasors], cannot be applied retroactively to impair that right. *Carickhoff v. Badger-Northland, Inc.*, 562 F. Supp. 160, 164 (W. D. Va. 1983). Such a retroactive application of the enactment would violate [defendant's] due process rights and would be invalid. *Duffy v. Hartsock*, 187 Va. at 416, 46 S.E.2d at 575. *See Strickland v. Simpkins*, 221 Va. 730, 734, 273 S.E.2d 539, 541 (1981).

228 Va. at 121, 319 S.E.2d at 754.

Each of the cases cited by the Supreme Court of Virginia, both in *Dillon* and in *Shiflet*, interpreted Virginia law and the effect to be given to a Virginia statute that retroactively affects substantive rights.

The case of *Duffy v. Hartsock*, 187 Va. 406, 46 S.E.2d 570 (1948), set forth the applicable rule of law:

> "[T]he legislature may, in its discretion, pass retrospective and curative laws, provided they do not partake of the nature of what are technically called *ex post facto* laws, and do not impair the obligation of contracts, or disturb vested rights . . . ."

Id. at 419, 46 S.E.2d at 576.

This prohibition of retroactive abrogation of common law rights is an ancient one in Virginia jurisprudence, independent of federal due process considerations:

> Now, let it be conceded there are restrictions upon the legislative power not found expressly enumerated in the constitution; that a law may not infringe upon any specific provision of that instrument and yet it may involve so flagrant an abuse of power that it is the imperative duty of the judiciary to interpose and arrest

> its execution . . . . All admit that it is not competent for the legislature by retroactive laws to interfere with vested rights.

Danville v. Pace, 65 Va. (25 Gratt.) 269, 272 (1874). *See also Whitlock v. Hawkins*, 105 Va. 242, 53 S.E. 401 (1906).

The only federal case cited in *Shiflet* was *Carickhoff v. Badger-Northland, Inc.*, 562 F. Supp. 160 (W.D. Va. 1983), where the United States District Court for the Western District of Virginia held that the retroactive application of § 8.01-35.1 violated both the Virginia and the United States Constitution. The Supreme Court of Virginia, however, carefully limited its citation in *Shiflet* to page 164 of the *Carickhoff* opinion. Page 164 of the *Carickhoff* opinion referred only to long established Virginia cases holding that the Virginia General Assembly had no power to enact retrospective legislation substantially impairing or destroying vested rights, and cited *Duffy v. Hartsock* for this proposition. *Carickhoff v. Badger-Northland, Inc.*, 562 F. Supp. at 164.[1] The Supreme Court of Virginia did not cite the portion of the *Carickhoff* opinion finding a violation of the United States Constitution, but solely that portion interpreting established principles of Virginia law. No reference whatsoever is made at page 164 of the *Carickhoff* opinion to federal constitutional law.

The *Dillon* decision stands as the most recent application by the Supreme Court of Virginia of long established principles of Virginia law. All of the precedents relied upon interpret Virginia law and no reliance is found on the federal Constitution. No federal question is present in this case.

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[1]As Judge Michael stated at page 164: "There is no lack of case law in Virginia concerning the circumstances under which legislation may be applied retroactively." *Id.* at 164.

Petitioner relies upon *Reynolds v. Milk Commission of Virginia*, 163 Va. 957, 179 S.E. 507 (1935), for its argument that all interpretations of Virginia's Due Process Clause mirror the federal Due Process Clause. *Reynolds* did not arise under the Due Process Clause of the Virginia Constitution, but rather under Article I, Section 1 thereof, titled "Equality and Rights of Men." *Reynolds* is no authority for interpretations of Virginia's Due Process Clause.

The Virginia Supreme Court's holding in *Dillon* that Respondent was not estopped from challenging the validity of the statute concerns only issues of state law in which no federal question is involved. See pp. 17-18 below.

As the Supreme Court of Virginia relied solely upon principles of state law, no jurisdiction exists in this Court to review the *Dillon* decision.

2. An Adequate And Independent State Law Ground Exists For The Decision Below.

If the Supreme Court of Virginia had decided this case on both state and federal constitutional grounds, the state law ground would be adequate to support the decision independent of any federal law.

This Court has recently enunciated the standard to be applied in determining whether a possible independent state law ground exists in a case:

> [W]hen . . . a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so.

Michigan v. Long, 463 U.S. 1032, 1040-41 (1983).

The *Dillon* opinion, however, does not rest primarily on federal law and is not interwoven with federal law. No principle of federal law, constitutional or otherwise, is cited anywhere in *Dillon*, nor are any federal cases relied upon. There is no fair reading of the *Dillon* decision which can support any inference that the Virginia Supreme Court decided *Dillon* as it did because it believed that federal law required it to do so.

On the other hand, the adequacy and independence of the state law ground is clear. Each of the cases cited and discussed is an earlier decision of the Virginia Supreme Court, which cases in turn arise from a distinct line of jurisprudence in Virginia. The cases relied upon in the controlling precedent, *Shiflet v. Eller*, also are cases interpreting principles of Virginia law. *See Duffy v. Hartsock*, 187 Va. 406, 46 S.E.2d 570 (1958); *Whitlock v. Hawkins*, 105 Va. 242, 53 S.E. 401 (1906). This state law ground is independent and adequate to sustain the challenged decision.

3. No Substantial Question Of Federal Law Is Involved In This Case.

The decision below turns upon determinations by the Virginia Supreme Court of unique principles of Virginia common law relating to the accrual and vesting of causes of action and rights of defense which do not involve any question of federal law. The constitutional foundation for the holding in *Dillon* is the settled doctrine that the retroactive abrogation of substantive and accrued rights at common law is a violation of fundamental notions of due process. The application of this doctrine to the facts of this case presents no novel issues of substance meriting review by this Court.

In *Coombes v. Getz*, 285 U.S. 434 (1932), a case dealing with accrued contract rights, this Court stated:

> When a right has arisen upon a contract, or a transaction in the nature of a contract authorized by statute, and has been so far perfected that nothing remains to be done by the party asserting it, the repeal of the statute does not affect it, or an action for its enforcement. It has become a vested right which stands independent of the statute.
>
> [T]he right to enforce [the obligation under the statute], having become vested, comes within the protection of . . . the due process of law clause in the 14th Amendment, of the federal Constitution.

Id. at 445, 448. *See also Ettor v. Tacoma*, 228 U.S. 148 (1913) (dealing with vested causes of action).

Petitioner objects to the application of the principles of *Coombes* and *Ettor* to the "inchoate" right of contribution. The Virginia Supreme Court, however, rejected the argument that contribution was merely an inchoate right. It determined that the right of contribution was a substantive right under Virginia law which had become so far perfected under the facts of this case that its retroactive abrogation violated fundamental notions of due process. This holding is in accord with the well established doctrine that rights, sufficiently perfected under law, may not be impaired by retroactive legislation.

No novel or substantial issue of federal law is presented by the facts of this case which requires reanalysis of this settled concept.

4. The Issues Presented In This Case Are Not Sufficiently Important To Merit Review By This Court.

Review on a Writ of Certiorari is not a matter of right and is to be granted only "when there are special and important reasons therefor." Rule 17, *Rules of the Supreme Court of*

the United States. Rule 17 indicates the character of the reasons to be considered in determining whether the discretionary review on a Writ of Certiorari is to be exercised. Those reasons include a conflict among the federal circuits, a conflict on federal law among state courts of last resort, and a decision involving an important unsettled question of federal law or one decided in such a way as to conflict with applicable decisions of this Court.

None of the considerations above support the exercise of this Court's discretionary power to review. Petitioner has cited no conflict among the federal circuits involving issues similar to those presented in this case. No conflicting decisions involving state courts of last resort are cited, and none can be. Indeed, the only relevant issues in this case turn on principles of common law unique to Virginia and no principles of national importance are involved.

Petitioner argues that the analysis in *Dillon* fails to apply the "rational means" test set forth in *Pension Benefit Guarantee Corporation v. Gray*, ____ U.S. ____, 104 S. Ct. 2709 (1984). *Gray* is not applicable to the present case. The "rational means" test in *Gray* applies to a distinct line of authority relating to national economic legislation, not common law causes of action as involved in this case. In the context of national economic legislation, this Court stated:

> [T]he strong deference accorded legislation in the field of national economic policy is no less applicable when that legislation is applied retroactively.

Id. at ____, 104 S. Ct. at 2718. No issue of national economic policy is involved in this case.

Moreoever, in *Gray*, this Court noted that it was "eminently rational" for the Congress to conclude that the purposes of the Multi-Employer Pension Plan Amendments

Act of 1980 could be more fully effectuated if its withdrawal liability provisions were given limited retroactive effect in order to prevent withdrawals occuring during the lengthy legislative process. Conspicuously absent from Petitioner's argument in the present case is any indication of a "rational basis" for an unlimited retroactive abrogation of an accrued common law right. Petitioner cites only the rational basis for the initial enactment of the statute, i.e., a policy of encouraging settlement of legal disputes. No such rational basis exists for the retroactive application of § 8.01-35.1. The legislative policy supporting the entire statute (i.e., facilitating settlements), cannot serve as a rational basis for the subsequent amendment of the statute retroactively eliminating the accrued rights of joint tort-feasors. If this were the case, *any* retroactive statute whatsoever could be supported by a "rational basis" and the test for the constitutionality of such statutes would effectively disappear.

Petitioner also argues that the Virginia Supreme Court failed to consider whether to apply a "new standard" of due process retroactively or prospectively, and cites *Chevron Oil Co. v. Huson*, 404 U.S. 97, (1971) to support its proposition that such a decision was necessary. The Supreme Court of Virginia, however, announced no new constitutional standard. To the contrary, this case involves the retroactive abrogation of substantive common law rights which the Supreme Court of Virginia, in accord with the decisions of this Court and the courts of the states, has long held to be constitutionally impermissible. *See, e.g., Duffy v. Hartsock*, 187 Va. 406, 46 S.E.2d 570 (1948); *Whitlock v. Hawkins*, 105 Va. 242, 53 S.E. 401 (1906); *Danville v. Pace*, 65 Va. (25 Gratt.) 269 (1874). *See also Coombes v. Getz*, 285 U.S. 434 (1932). Petitioner cites no case, either from a federal court or from a supreme court of a sister state, setting forth a contrary result.

There is nothing novel or unique in the Supreme Court of Virginia's application of the long established doctrine prohibiting retroactive abrogation of accrued common law rights. None of the factors necessary to render this case worthy of Supreme Court review are present.

5. The Decision Below Was Correct.

Petitioner's statement of the Virginia Supreme Court's holding in this case is incorrect. Petitioner states that the Virginia Supreme Court "has pronounced that a legislative body, even with clear expression of its intent, cannot constitutionally enact a statute that retroactively alters a mere inchoate right". *Petition for a Writ Certiorari*, p. 5.

The *Dillon* opinion, however, held that the statute in question retroactively *eliminated* both a substantive common law cause of action (contribution) and a vested common law defense (release of one tort-feasor releases all). Petitioner's statement that this is a principle of constitutional law which has never been accepted by any court, state or federal, is incorrect. It has always been the law that accrued common law causes of action and defenses may not be retroactively eliminated by statute.

a. The retroactive abrogation of common law causes of action is a violation of due process.

The Virginia Supreme Court has determined in this case that the right of contribution among joint tort-feasors became sufficiently perfected upon the occurrence of the incident giving rise to liability among the joint tort-feasors that its retroactive abrogation violated due process of law.

In reaching this decision, the Supreme Court of Virginia analyzed the distinction between a "cause of action" and a "right of action," the former accruing at the time of the jointly negligent acts and the latter when one joint tort-

feasor pays a disproportionate amount of a claim for which other joint tort-feasors are also liable. *Dillon*, 229 Va. at ____, 329 S.E.2d at 44, n.3. This distinction, long established in Virginia law, has been held by the Supreme Court of Virginia to be a "distinction *with* a difference". *First Virginia Bank-Colonial v. Baker*, 225 Va. 72, 81, 301 S.E.2d 8, 13 (1983)(emphasis in original). *See also Nationwide Insurance Co. v. Minnifield*, 213 Va. 797, 799, 196 S.E.2d 75, 77 (1973); *Lewis v. Glenn*, 84 Va. 947, 979, 6 S.E. 866, 882 (1888). The Court pointed out that the cause of action for contribution was "inchoate" in the limited sense that suit by one tort-feasor against another could not be brought until payment, that is, until the *right* of action had accrued. That concept, however, was irrelevant to this case, for here the issue was when the *cause of action* accrued under Virginia law and was therefore no longer capable of being retroactively abrogated. The Supreme Court of Virginia held in *Dillon* that the cause of action for contribution accrued at the time of the accident.

There is nothing constitutionally novel in *Dillon*. A similar result was reached by this Court under an analogous set of facts. In *Ettor v. Tacoma*, 228 U.S. 148 (1913), plaintiff brought suit against the City of Tacoma, Washington under a statute requiring municipalities to make compensation for consequential damages due to street grading. While the action was pending, the statute was repealed and the trial court directed a verdict for the municipality under the theory that the right of action, which was merely statutory, failed when the statute was repealed without a saving clause. This judgment was reversed by this Court:

> The court below gave a retrospective effect to the amendatory and repealing act by holding that the effect of the repeal was to destroy the right to compensation which had accrued while the act was in force. The

> obligation of the city was fixed. The plaintiffs in error had a claim which the city was as much under obligation to pay as for the labor employed to do the grading. . .
>
> The necessary effect of the repealing act, as construed and applied by the court below, was to deprive the plaintiffs in error of any remedy to enforce the fixed liability of the city to make compensation. This was to deprive the plaintiffs in error of a right which had vested before the repealing act, a right which was in every sense a property right. Nothing remained to be done to complete the plaintiffs' right to compensation except the ascertainment of the amount of damage to their property. The right of the plaintiffs in error was fixed by the law in force when their property was damaged for public purposes, and the right so vested cannot be defeated by subsequent legislation.

Id. at 155-56. *See also Coombes v. Getz*, 285 U.S. 434 (1932).

The circumstances in the present case are similar. Here, the Respondent's cause of action for contribution arose at the time of the tort. Nothing remained to be done by the Respondent to complete its right to compensation except the ascertainment of the amount of damages. Although "inchoate" in this limited sense, the cause of action for contribution was nevertheless "so far perfected that nothing remain[ed] to be done by the party asserting it" and was entitled to constitutional protection. *Coombes v. Getz*, 285 U.S. at 445.

Petitioner also argues that contribution, as a statutory right under Virginia law, is subject to retroactive abrogation after accrual. The Supreme Court of Virginia has consistently refused to allow retroactive abrogation of *any* substantive right, whether based upon statute or upon the

common law. *See e.g., Goodstein v. Weinberg*, 219 Va. 105, 245 S.E.2d 140 (1978).

The Virginia rule that the legislature may not retroactively impair substantive rights is in accord with the rule applied in other states. The long established principle governing retroactivity of statutes states that only statutes relating to procedural matters, and not those affecting substantive rights, are to be treated as operating retroactively:

> The distinction thus drawn between statutes which adversely affect vested, substantive rights and those statutes which affect only the remedies available for enforcement of pre-existing substantive rights has been justified on the ground that, if the former "were construed to operate retroactively, at least insofar as the previously acquired rights of individuals were affected, there might be hardship *as well as constitutional difficulties*."

deLeo v. Childs, 304 F. Supp. 593, 596-97 (D. Mass. 1969), *quoting Greenaway's Case*, 319 Mass. 121, 123, 65 N.E.2d 16, 18 (1946) (emphasis added). *Accord Ettor v. Tacoma*, 228 U.S. 148 (1913).

The *Dillon* decision is in accord with this doctrine and was plainly correct under long established principles of constitutional law.

b. The retroactive abrogation of a vested common law defense is a violation of due process.

Dillon also held that the statute in question retroactively "eliminates the long standing common law defense that the release of one joint tort-feasor releases all." *Dillon*, 229 Va. at ____, 329 S.E.2d at 45. Before the enactment of the statute, Virginia had consistently followed the strict common law rule that a release of one tort-feasor releases all

joint tort-feasors. *See Wright v. Orlowski*, 218 Va. 115, 235 S.E.2d 349 (1977); *Ruble v. Turner*, 12 Va. (2 Hen. & M.) 38 (1808). The Supreme Court of Virginia has observed that "the rule is one of ancient origin, honored without exception in this Commonwealth, and fully familiar to bench and bar." *Wright v. Orlowski*, 218 Va. at 123, 235 S.E.2d at 354.

The statute in question in this case retroactively abrogated this ancient common law defense. Petitioner makes the bold assertion that retroactive elimination of a common law defense does not violate due process of law, and cites *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59 (1978), as authority. *Duke Power* is not such authority.

The exact portion of *Duke Power* cited by Petitioner stands simply for the proposition that a person has no vested interest in the prospective continuation of a rule of common law and that such rules may be altered prospectively by statute. The case does not stand for the proposition that common law rights, once accrued, may be so abrogated.

It has long been the law that a right created under common law, once perfected, cannot be taken away without violating due process. *Coombes v. Getz*, 285 U.S. 434 (1932); *Mondou v. New York, New Haven and Hartford Railroad Co.*, 223 U.S. 1 (1912).

In *Dillon*, the Supreme Court of Virginia held that the common law defense that release of one joint tort-feasor releases all was the established law at the time of the alleged malpractice "when the rights and obligation of the parties were determined." *Dillon*, 229 Va. at ____, 329 S.E.2d at 45. *See also Norfolk & Southern R. Co. v. Beskin*, 140 Va. 744, 747, 125 S.E. 678, 679 (1924). The holding in *Dillon* that the retroactive elimination of this common-law defense violated due process of law was plainly correct.

6. The Virginia Supreme Court's Decision That Respondent Was Not Estopped From Challenging The Constitutionality Of A State Statute Is A Matter Of State Law.

Petitioner argues that the Virginia Supreme Court's application of the common law doctrine of estoppel to the facts of this case was incorrect and should be reversed by this Court. This issue, however, is dependent upon state law principles of estoppel and involves no federal question. As Petitioner relied in the Virginia Supreme Court solely upon state law principles of estoppel, Petitioner waived any federal question it might seek to assert by failing to raise it in a timely manner for decision below. Regardless of the presence or absence of a federal question, it is clear that the decision of the Virginia Supreme Court was correct.

In *Dillon*, the Virginia Supreme Court stated that the issue of estoppel to challenge a state statute turns, under Virginia law, on whether one "voluntarily proceeds" under the statute. *Dillon*, 229 Va. at ____, 329 S.E.2d at 43. *See also Bisping v. Commonwealth*, 218 Va. 753, 240 S.E.2d 656, *cert. denied*, 435 U.S. 1007 (1978). The Virginia Supreme Court held that the respondent did not request the application of the statute but rather "vigorously challenged its application throughout the trial" and was therefore not estopped. *Dillon*, 229 Va. at ____, 329 S.E.2d at 44.

A state court's decision on estoppel to assert a right, even a federal constitutional right, is not a federal question, but rather one of state law. *See Enterprise Irrigation District v. Farmers Mutual Canal Co.*, 243 U.S. 157 (1917); *Pierce v. Somerset Ry.*, 171 U.S. 641 (1898). The issue of estoppel decided upon principles of state law is not within the jurisdiction of this Court to review. *Leonard v. Vicksburg, Shreveport and Pacific Railroad Co.*, 198 U.S. 416 (1905).

If there is any federal question involved in the issue of estoppel, Petitioner failed to raise it in the Virginia Su-

preme Court. Petitioner relied in the Virginia Supreme Court on the cases of *Bisping v. Commonwealth*, 218 Va. 753, 240 S.E.2d 656, *cert. denied*, 435 U.S. 1007 (1978) and *Spindel v. Jamison*, 199 Va. 954, 103 S.E.2d 205 (1958), both of which were earlier decisions of the Virginia Supreme Court. No issue of federal law was raised by the Petitioner concerning the issue of estoppel in the Virginia Supreme Court, and Petitioner has now waived such arguments and may not pursue them in this Court.

The decision of the Supreme Court on the issue of estoppel was plainly correct. Petitioner would have this Court hold that to preserve a constitutional challenge to a statute, a litigant must waive all objection to the construction of the statute and forego defense of its application to him on the merits. The Supreme Court of Virginia's decision properly recognized the injustice of such a result, and is plainly correct.

CONCLUSION

For these reasons, a Writ of Certiorari should not be issued to review the judgment and opinion of the Virginia Supreme Court.

Respectfully submitted,

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Supreme Court, U.S.
FILED
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

No. 85-388 (5)

JOSEPHINE A. DILLON, Committee of HILDA NADINE AMIDON, a legally incompetent person,

Petitioner,

v.

POTOMAC HOSPITAL CORPORATION,

Respondent.

OBJECTION OF RESPONDENT TO MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE BY VIRGINIA BROWN, ET AL.

BRIEF FOR RESPONDENT IN OPPOSITION TO BRIEF AMICUS CURIAE

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IN THE

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Potomac Hospital Corporation,[1] Respondent herein, objects to the motion of

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[1]The Listing pursuant to rule 28.1 is stated in the Brief for Respondent in Opposition to Petition for a Writ of Certiorari.

Virginia Brown, Executrix of the Estate of Wilbur Brown, and 370 other individuals (Amicus Petitioners) represented by Robert R. Hatten for leave to file a Brief Amicus Curiae in this proceeding. The reasons why leave to file such Brief should be denied are as follows:

1. Rule 36.1 states that a Motion to file a Brief Amicus Curiae prior to consideration of the Petition for a Writ of Certiorari is not favored. Amicus Petitioners make their Motion prior to consideration of the Petition herein.

2. Judge McKenzie of the United States District Court for the Eastern District of Virginia has ruled in a case in which two Amicus Petitioners herein, Charles Wesley Mann, Administrator of the Estate of Elizabeth Francis Mann, and Francis Marion Cave, are plaintiffs, that the issue of settlement and release in the asbestos cases in which Amicus Petitioners

are involved will be governed by federal common law, and not by the decision of the Virginia Supreme Court herein, Potomac Hospital Corporation v. Dillon, 229 Va. __, 329 S.E.2d 41 (1985). See Mann v. H. K. Porter and Southern Textile Corp., No. 83-477-N Civ. (E.D. Va. July 8, 1985) and Francis Marion Cave v. Johns-Manville Corp., No. 77-738N (E.D. Va. July 8, 1985).

Amicus Petitioners' interest is not ripe. It is entirely probable, under the doctrine of stare decisis, that the Amicus Petitioners will never be subject to the Dillon decision. They therefore lack the interest necessary for amicus status.

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5. Amicus Petitioners raise no new issues, but merely restate and reargue the questions presented by Petitioner. Repetition is not the office of Amicus Curiae.

For the above reasons, the Motion of Virginia Brown, et al. should be denied.

Respectfully Submitted,

By: Robert H. J. Loftus

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Potomac Hospital
Corporation

Attorneys for Respondent:
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Robert H. J. Loftus

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Section 8.01-35.1, Code of Virginia (1984 Repl. Vol.) . . . . . passim

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

No. 85-388

JOSEPHINE A. DILLON, Committee of HILDA NADINE AMIDON, a legally incompetent person,

Petitioner,

v.

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Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO BRIEF AMICUS CURIAE OF VIRGINIA BROWN, ET AL. IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

Respondent, Potomac Hospital Corporation, respectfully requests that the Petition for a Writ of Certiorari to the Supreme Court of Virginia be denied by this Court.

QUESTIONS PRESENTED

1. Whether the rational basis test applies to state legislation retroactively abrogating accrued causes of action and defenses, and requires reversal?

2. Whether unconstitutional retroactive state legislation must be enforced by a state court?

SUMMARY OF ARGUMENT

The rational basis test does not apply to local, non-economic legislation which retroactively abrogates accrued causes of action and defenses.

Equitable rules of restraint developed by this Court to limit its own decisions do not prevent a state court from interdicting unconstitutional state legislation.

ARGUMENT

I. THE RATIONAL BASIS TEST DOES NOT APPLY AND DOES NOT REQUIRE REVERSAL OF THE DECISION BELOW.

Amicus Petitioners complain of the asserted failure of the Virginia Supreme Court to uphold Section 8.01-35.1(D) in the light of a "rational basis" inquiry, citing Usery v. Turner Elkhorn Mining Corp., 428 U.S. 1 (1976); Pension Benefit Guaranty Corp. v. R. A. Gary & Co., ___ U.S. ___, 104 S. Ct. 2709 (1984), and United States v. Locke, ___ U.S. ___ 105 S. Ct. 1785 (1985).

These cases support the application of the rational basis test to retrospective legislation where national economic legislation is at issue. These cases are not authority for the application of the rational basis test to state legislation retroactively abrogating substantive, accrued common law causes of action and defenses.

The proper standard for review of legislation which retroactively abrogates accrued causes of action and defenses was settled by this Court in Ettor v. Tacoma, 228 U.S. 148 (1913) and Coombs v. Getz, 285 U.S. 434 (1932), and confirms the result below.

Application of the rational basis test to § 8.01-35.1(D) would not produce a different result. No reason has been proffered to support the subsequent retroactive amendment of § 8.01-35.1. Amicus Petitioners merely cite the reason for the enactment of § 8.01-35.1, and cite no reason supporting the retroactive amendment embraced in § 8.01-35.1(D).

Amicus Petitioners assume, without addressing, that the Dillon decision was made under federal, rather than Virginia, constitutional grounds. As the Brief in Opposition to the Petition for a Writ of Certiorari filed herein by Respondent

demonstrates, Dillon was decided on state law grounds. The authorities cited by Amicus Petitioners fail to establish any error in the interpretation of the Virginia Constitution, and do not require a state court to apply the rational basis test to state legislation.

II. A STATE SUPREME COURT IS NOT REQUIRED TO GIVE EFFECT TO UNCONSTITUTIONAL LEGISLATION.

Amicus Petitioners argue that Chevron Oil Co. v. Huson, 404 U.S. 97 (1971), mandates that even though Respondent's rights have been unconstitutionally abrogated by the Virginia legislature, the Virginia Supreme Court is powerless to protect Respondent's rights if the decision involves a new principle of law. Chevron is not authority for such a proposition.

Chevron set forth equitable principles which this Court will apply in determining whether to give retrospective effect to a

new principle of law announced by this Court. Chevron does not purport to take away the judicial power to interdict unconstitutional retroactive legislation such as is at issue in this case.

Chevron does not bind state courts in interpreting state constitutions. Amicus Petitioners do not present any authority that a state court's failure to follow Chevron in interpreting federal law presents a federal question within this Court's jurisdiction.

Moreover, Chevron does not apply to the Dillon decision, as Dillon did not apply a new principle of law, and did not overrule prior precedent, as has been demonstrated in the Brief in Opposition to the Petition for a Writ of Certiorari. As the Court in Dillon stated, its decision was controlled by its prior decision in Shiflet v. Eller, 228 Va. 115, 319 S.E.2d 750, (1984) where it held that retroactive

application of § 8.01-35.1 would violate due process. Dillon, 229 Va. at ___, 329 S.E.2d at 44-45.

Even if Dillon can be said to have presented an issue of first impression, its resolution was clearly foreshadowed.

Petitioner's agreement to release the other tortfeasors in this case was made on July 14, 1983. Four months prior to that date the United States District Court for the Western District of Virginia held § 8.01-35.1(D) to be an unconstitutional abrogation of the vested right of contribution. Carickhoff v. Badger-Northland, Inc., 562 F. Supp. 160 (W.D. Va. 1983).

Dillon is in accord with the prior case law. Sixty years prior to Dillon, the Supreme Court of Virginia held that the rights of joint tortfeasors could not be abrogated retroactively. In Norfolk & Southern R. Co. v. Beskin, 140 Va. 744, 125

S.E. 678 (1924), the railroad company sought contribution from Beskin under a statute enacted subsequent to the accident which created a right of contribution. In holding that the railroad had no right to contribution, the Court stated:

> [W]hile the revisors of the Code . . . have by statute abrogated the doctrine [no contribution among tortfeasors] existing in Virginia, this statute did not become a law until after the commission of the joint tort, and therefore cannot affect the rights of the parties, as they are to be determined by the law as of the time of the accident.

Id. at 747, 125 S.E. at 679.

Amicus Petitioner's authorities do not presage a different result, and are distinguishable from the Dillon decision. Town of Danville v. Pace, 65 Va. (25 Gratt.) 269 (1874), held only that the defense of usury was not a vested right, on the grounds that no person can have a vested right in a penalty and forfeiture law.

Humble Oil v. Copley, 213 Va. 449, 192 S.E.2d 735 (1972), involved no question of vested rights, but rather the application of the Uniform Commercial Code to events happening after its effective date.

Brown v. Western State, 110 Va. 321, 66 S.E. 49 (1909), held that the Commonwealth of Virginia loses a statutory right of action against a private citizen when the Virginia legislature repeals the law creating the right of action, under the obvious logic that the legislature is the state, and can revoke its own rights.

Bain v. Boykin, 180 Va. 259, 23 S.E.2d 127 (1942), held that a litigant had no vested right in a judgment of a trial court such as to preclude reversal by an appellate court. Eaton v. Davis, 176 Va. 330, 10 S.E.2d 893 (1940), likewise held that a person has no vested right in an alimony decree.

Opinions of the Attorney General of Virginia are not precedent, Albemarle County v. Marshall, Clerk, 215 Va. 756, 762, 214 S.E.2d 146, 150 (1975), nor are denials of Petitions for Writs of Error by the Virginia Supreme Court, Shiflet v. Eller, 228 Va. 115, 122 n.2, 319 S.E.2d 750, 755 n.2 (1984). Amicus Petitioner's reliance on such opinions is misplaced.

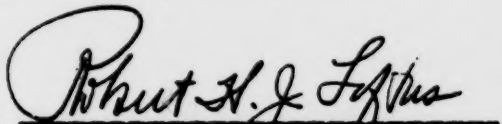
Hayman v. Patio Products, Inc., 226 Va. 482, 311 S.E.2d 752 (1984), did not involve any challenge to § 8.01-35.1(D) as an unconstitutional abrogation of vested or substantive rights.

Chevron Oil Co. v. Huson, 404 U.S. 97 (1971), does not apply to this case, and does not require reversal.

CONCLUSION

For the foregoing reasons, a Writ of Certiorari should not issue.

Respectfully Submitted,

By: 

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Attorneys for Respondent:

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CERTIFICATE

I hereby certify that on the 21st day of October, 1985, a true copy of the foregoing Brief for Respondent in Opposition to Brief Amicus Curiae of Virginia Brown, et al. in Support of Petition for Writ of Certiorari to the Supreme Court of Virginia was mailed, postage prepaid, to Frank J. Ceresi, Esquire, 2300 South 9th Street, Suite 112, Arlington, Virginia 22204, Counsel for Petitioner; The Honorable William S. Broaddus, Acting Attorney

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Robert H. J. Loftus

Supreme Court, U.S.
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BRIEF FOR RESPONDENT IN OPPOSITION TO BRIEF AMICUS CURIAE

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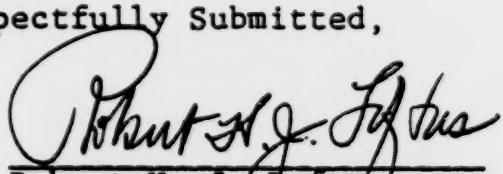
For the above reasons, the Motion of Virginia Brown, et al. should be denied.

Respectfully Submitted,

By: 

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> [W]hile the revisors of the Code . . . have by statute abrogated the doctrine [no contribution among tortfeasors] existing in Virginia, this statute did not become a law until after the commission of the joint tort, and therefore cannot affect the rights of the parties, as they are to be determined by the law as of the time of the accident.

Id. at 747, 125 S.E. at 679.

Amicus Petitioner's authorities do not presage a different result, and are distinguishable from the Dillon decision. Town of Danville v. Pace, 65 Va. (25 Gratt.) 269 (1874), held only that the defense of usury was not a vested right, on the grounds that no person can have a vested right in a penalty and forfeiture law.

Humble Oil v. Copley, 213 Va. 449, 192 S.E.2d 735 (1972), involved no question of vested rights, but rather the application of the Uniform Commercial Code to events happening after its effective date.

Brown v. Western State, 110 Va. 321, 66 S.E. 49 (1909), held that the Commonwealth of Virginia loses a statutory right of action against a private citizen when the Virginia legislature repeals the law creating the right of action, under the obvious logic that the legislature is the state, and can revoke its own rights.

Bain v. Boykin, 180 Va. 259, 23 S.E.2d 127 (1942), held that a litigant had no vested right in a judgment of a trial court such as to preclude reversal by an appellate court. Eaton v. Davis, 176 Va. 330, 10 S.E.2d 893 (1940), likewise held that a person has no vested right in an alimony decree.

Opinions of the Attorney General of Virginia are not precedent, Albemarle County v. Marshall, Clerk, 215 Va. 756, 762, 214 S.E.2d 146, 150 (1975), nor are denials of Petitions for Writs of Error by the Virginia Supreme Court, Shiflet v. Eller, 228 Va. 115, 122 n.2, 319 S.E.2d 750, 755 n.2 (1984). Amicus Petitioner's reliance on such opinions is misplaced.

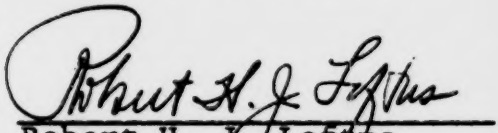
Hayman v. Patio Products, Inc., 226 Va. 482, 311 S.E.2d 752 (1984), did not involve any challenge to § 8.01-35.1(D) as an unconstitutional abrogation of vested or substantive rights.

Chevron Oil Co. v. Huson, 404 U.S. 97 (1971), does not apply to this case, and does not require reversal.

CONCLUSION

For the foregoing reasons, a Writ of Certiorari should not issue.

Respectfully Submitted,

By: 
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CERTIFICATE

I hereby certify that on the 21st day of October, 1985, a true copy of the foregoing Brief for Respondent in Opposition to Brief Amicus Curiae of Virginia Brown, et al. in Support of Petition for Writ of Certiorari to the Supreme Court of Virginia was mailed, postage prepaid, to Frank J. Ceresi, Esquire, 2300 South 9th Street, Suite 112, Arlington, Virginia 22204, Counsel for Petitioner; The Honorable William S. Broaddus, Acting Attorney

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Robert H. J. Loftus

Supreme Court, U.S.
FILED
OCT 29 1985
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

No. 85-388

JOSEPHINE A. DILLON, Committee of
HILDA NADINE AMIDON, a legally
incompetent person,

Petitioner,

v.

POTOMAC HOSPITAL CORPORATION,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO BRIEF AMICUS CURIAE OF THE ATTORNEY GENERAL OF VIRGINIA

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

No. 85-3[illegible]8

JOSEPHINE A. DILLON, Committee of HILDA NADINE AMIDON, a legally incompetent person,

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v.

POTOMAC HOSPITAL CORPORATION,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO BRIEF AMICUS CURIAE OF THE ATTORNEY GENERAL OF VIRGINIA

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

No. 85-388

JOSEPHINE A. DILLON, Committee of HILDA NADINE AMIDON, a legally incompetent person,

Petitioner,

v.

POTOMAC HOSPITAL CORPORATION,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO BRIEF AMICUS CURIAE OF THE ATTORNEY GENERAL OF VIRGINIA

Respondent, Potomac Hospital Corporation,[1] respectfully requests that the Petition for a Writ of Certiorari to the Supreme Court of Virginia be denied by this Court.

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[1]The Listing pursuant to rule 28.1 is stated in the Brief for Respondent in Opposition to Petition for a Writ of Certiorari.

QUESTIONS PRESENTED

1. Whether the decision below rests upon the Due Process Clause of the Fourteenth Amendment to the United States Constitution?

2. Whether the rational basis test applies to state legislation retroactively abrogating accrued causes of action and defenses, and requires reversal?

3. Whether retroactive abrogation of accrued causes of action and defenses violates due process of law?

4. Whether matters of state public policy raise federal questions?

5. Whether the severability test applies to the statute in question and requires reversal of the decision below?

SUMMARY OF ARGUMENT

The Supreme Court of Virginia relied in this case entirely upon long established principles of Virginia law. No federal question is involved in this case.

The rational basis test does not apply to local, non-economic legislation which retroactively abrogates accrued causes of action and defenses.

The Virginia General Assembly in the present case retroactively eliminated the right of contribution among joint tortfeasors and the common law defense that release of one joint tortfeasor releases all. These rights had accrued to the Respondent at the time of the incident and

the Virginia Supreme Court was correct in holding that they could not, by later legislation, be retroactively abrogated.

Matters of public policy in Virginia do not raise constitutional issues.

The Attorney General's severability argument was not raised below and cannot be considered now for the first time. The severability argument involves no federal question. Both portions of the statute cited by the Attorney General were held unconstitutional and severing one portion of the statute will not change the result below.

ARGUMENT

I. THE DECISION BELOW DOES NOT REST UPON THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION

In its Brief Amicus Curiae, the Attorney General of Virginia asserts that

the decision below rests upon the Due Process Clause of the Fourteenth Amendment to the United States Constitution. As the Brief in Opposition to the Petition for a Writ of Certiorari filed herein by Respondent demonstrates, the Supreme Court of Virginia in the present case cited and relied upon its settled jurisprudence in the area of retroactivity and not on principles of federal law. Neither the present case, Potomac Hospital Corporation v. Dillon, 229 Va. ___, 329 S.E.2d 41 (1985) nor the case it relied upon, Shiflet v. Eller, 228 Va. 115, 319 S.E.2d 750 (1984), cites or discusses the federal constitution. Each of the cases cited in Dillon and Shiflet interprets Virginia law and the effect to be given to a Virginia statute retroactively impairing substantive rights.

The Attorney General cites Reynolds v. Milk Commission of Virginia, 163 Va.

957, 179 S.E. 507 (1935), for the proposition that all interpretations of the Virginia Due Process Clause mirror the federal Due Process Clause. Reynolds, however, arose under Article I, Section 1 of the Virginia Constitution, titled "Equality and Rights of Men," and is not authority for interpreting the Virginia Due Process Clause.

The Attorney General also relies on Town of Danville v. Pace, 66 Va. (25 Gratt.) 1 (1874), for the same proposition. Pace did not arise under the Due Process Clause of either the federal or the Virginia Constitution. The Due Process Clause of the Virginia Constitution was not enacted until 1902, almost thirty years after the Pace decision. See HOWARD, **Commentaries on the Constitution of Virginia**, p. 189 (1974). Pace does not support the Attorney General's argument.

The Supreme Court of Virginia relied in the decision below solely upon principles of state law. Accordingly, no jurisdiction exists in this Court to review the decision.

II. THE RATIONAL BASIS TEST DOES NOT APPLY AND DOES NOT REQUIRE REVERSAL OF THE DECISION BELOW

The Attorney General asserts that the "rational basis" test of Usery v. Turner Elkhorn Mining Co., 428 U.S. 1 (1976), Pension Benefit Guaranty Corp. v. R. A. Gary & Co., ___ U.S. ___, 104 S. Ct. 2709 (1984), United States v. Locke, ___ U.S. ___, 105 S. Ct. 1785 (1985), and National Railroad Passenger Corp. v. Atchison, Topeka and Santa Fe Railway Co., ___ U.S. ____, 105 S. Ct. 1441 (1985), requires reversal of the decision below.

These cases apply the rational basis test only to national economic legislation. They do not support the

application of the rational basis test to state legislation retroactively abrogating substantive, accrued common law causes of action and defenses.

This Court stated the proper standard for review of legislation retroactively abrogating accrued causes of action and defenses in Ettor v. Tacoma, 228 U.S. 148 (1913), and Coombes v. Getz, 285 U.S. 434 (1932). These cases require affirmance of the result below.

Application of the rational basis test to § 8.01-35.1(D) would not produce a different result. The Attorney General cites the rationale for the enactment of § 8.01-35.1, but cites no rationale supporting the retroactive amendment contained in § 8.01-35.1(D).

III. RETROACTIVE ABROGATION OF ACCRUED COMMON LAW CAUSES OF ACTION AND DEFENSES VIOLATES DUE PROCESS OF LAW.

The Attorney General asserts that the "right of action" for contribution did not vest until the release was signed in July, 1983, citing First Virginia Bank-Colonial v. Baker, 225 Va. 72, 301 S.E.2d 8 (1983), and therefore argues that no accrued rights were violated here. First Virginia Bank is not such authority. First Virginia Bank did not deal with contribution, but rather determined when the statute of limitations commenced to run for property damage arising from negligence under a statute of limitations which was repealed in 1977.

More importantly, the question of when, as a matter of state law, a litigant's entitlement to contribution arises, has been decided by the Supreme Court of Virginia, and reargument of this question is foreclosed here.

The Attorney General cites no case which upholds the constitutionality of a statute retroactively abrogating an accrued common law cause of action or defense. The Supreme Court of Virginia was correct in its holding in Dillon that the cause of action for contribution accrued at the time of the accident and could not subsequently be abrogated without violating due process of law.

IV. MATTERS OF STATE PUBLIC POLICY DO NOT RAISE FEDERAL QUESTIONS.

The Attorney General complains that the Dillon decision infringes upon the Virginia General Assembly's exercise of its legislative powers.

One of the essential functions of the judiciary is to review the constitutionality of legislation. The judiciary cannot perform this function without, on proper occasions, limiting the legislative power. To complain that the judiciary has

exercised its duty to strike down unconstitutional legislation adds nothing to the question concerning the constitutionality of the legislation in question.

The Attorney General also complains that the Dillon decision is contrary to the public policy of Virginia. The public policy of Virginia, however, does not favor unconstitutional legislation. Nor does the Dillon decision portend the disastrous expansion of litigation portrayed by the Attorney General. The decision applies solely to causes of action accruing before July 1, 1979. The decision does not apply to litigation in federal courts, regardless of the basis of jurisdiction. Mann v. H. K. Porter Co., No. 83-477 (E.D. Va., July 8, 1985).

The Attorney General's "legislative prerogative" and "public policy" arguments deal exclusively with the relationship between a state legislature and state judi-

ciary. No federal or constitutional issue is involved.

V. THE SEVERABILITY DOCTRINE DOES NOT APPLY AND DOES NOT REQUIRE REVERSAL OF THE DECISION BELOW.

The Attorney General suggests that this Court should sever the portion of the statute, § 8.01-35.1(A)(2) (discharging the settling tortfeasor for contribution), from the remainder of the statute, including § 8.01-35.1(A)(1) (providing that the non-settling tortfeasors shall not be discharged from liability to the claimant), and give retroactive effect to only the portion which abrogates a non-settling tortfeasor's right of contribution from the settling joint tortfeasors and creates a different measure of the non-settling tortfeasor's liability to the claimant.

This issue was not raised below and cannot be considered for the first time on

a Petition for a Writ of Certiorari. Tacon v. Arizona, 410 U.S. 351 (1973).

Amicus Petitioner's severability argument raises no federal question. Severability is a matter of statutory construction under state law. See Harrison v. NAACP, 360 U.S. 167, 178 (1959).

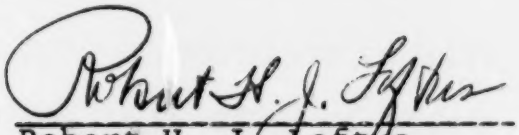
The Attorney General has misread the Dillon decision. The Supreme Court of Virginia held that both portions of the statute in question retroactively abrogated accrued, substantive rights (the common law cause of action of contribution, § 8.01-35.1(A)(2); and an accrued common law defense that release of one tortfeasor releases all, § 8.01-35.1(A)(1)). Both portions of the statute suffer from the same defect when applied retroactively. If either portion is unconstitutional, both are, for the same rule is violated by both. Both portions abrogate accrued,

substantive rights, and cannot be applied retroactively.

CONCLUSION

For the foregoing reasons, a Writ of Certiorari should not issue.

Respectfully Submitted,

By: 

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CERTIFICATE

I hereby certify that on the 29th day of October, 1985, a true copy of the foregoing Brief for Respondent in

Opposition to Brief Amicus Curiae of the Commonwealth of Virginia in Support of the Petition was mailed, postage prepaid, to The Honorable William G. Broaddus, Acting Attorney General, 101 N. 8th Street, Richmond, Virginia 23219; Frank J. Ceresi, Esquire, 2300 South 9th Street, Suite 112, Arlington, Virginia 22204, Counsel for Petitioner; and to Robert R. Hatten, Esquire, Patten, Wornom & Watkins, 739 Thimble Shoals Boulevard, Suite 105, Newport News, Virginia 23606, Counsel for Virginia Brown, et al..

Robert H. J. Loftus

85-388

No.

Supreme Court, U.S.
FILED
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JOSEPH F. SPANIOL, JR.
CLERK

In The
Supreme Court of the United States
October Term, 1985

Josephine A. Dillon, Committee of
Hilda Nadine Amidon, a legally
incompetent person,
Petitioner,

v.

Potomac Hospital Corporation,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

BRIEF AMICUS CURIAE OF THE COMMONWEALTH OF VIRGINIA IN SUPPORT OF THE PETITION

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INTEREST OF THE AMICUS CURIAE

The decision of the Virginia Supreme Court in Potomac Hospital v. Dillon, 229 Va. ___, 329 S.E.2d 41 (1985), would make settlements impossible in many areas of complex litigation facing modern courts. The practical effect of this decision on asbestos litigation, for example, would be in the words of Judge McKenzie of the Eastern District of Virginia ". . . disastrous, not only for the plaintiffs, but for this Court. . . This holding would result in a tremendous waste of resources and time for plaintiffs, defendants and the Court, as all cases would have to be tried to completion."[1] The Attorney General of Virginia files this amicus

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[1] Mann v. H. K. Porter and Southern Textile Corp., No. 83-477-N Civ. (E.D. Va. July 8, 1985) at p. 10.

brief because this potentially adverse impact of the decision below on the Commonwealth's court system is unnecessary and results from an erroneous application of constitutional principles.

Complex civil litigation more often than not involves multiple defendants in protracted and costly discovery and pre-trial procedures. The General Assembly of Virginia recognized the realities of contemporary litigation when it enacted legislation that changed the common law rule regarding the effect of releasing a joint tort-feasor. By providing that a release of one tort-feasor does not discharge those remaining from liability, the General Assembly facilitated prompt settlements. The decision below inhibits settlements and forces all parties to proceed to trial because plaintiffs cannot release willing defendants if the effect will be to absolve other nonsettling

tort-feasors from liability. It is in the interest of both protecting the exercise of proper legislative authority and avoiding the over-burdening of the court system with unnecessary litigation that the Commonwealth advances her arguments in favor of this Court granting a writ of certiorari to review Potomac Hospital v. Dillon.

SUMMARY OF ARGUMENT

At common law, the release of one joint tort-feasor released all defendants from liability. Section 8.01-35.1 of the Code of Virginia provides that release of one person does not discharge other persons unless the release so provides. The statute also provides that the settling tort-feasor is discharged from liability for contribution to other tort-feasors.

The right of contribution did not exist at common law and is created in Virginia only by this statute. It is inchoate, and does not vest until a joint tort-feasor has paid a claim for which the other joint tort-feasor is liable. First Virginia Bank-Colonial v. Baker, 225 Va. 72, 81, 301, S.E.2d 8, 13 (1983). A statute such as §8.01-35.1 may be applied retroactively when the legislature manifests this intent and it affects no contractual or vested rights. Such retroactive application does not offend due process rights guaranteed by the Constitution.

The Virginia Supreme Court's decision in Potomac Hospital v. Dillon, is contrary to well established constitutional principles. The court held that as a "substantive" right, contribution is included with vested rights as having constitutional due process protection from the application of

retroactive legislation. However, §8.01-35.1 has a rational basis in regard to its legislative purpose, to encourage settlements. Hayman v. Patio Products, Inc., 226 Va. 482, 311 S.E.2d 752 (1984). As enunciated by the United States Supreme Court, this is the sole requirement regarding substantive rights in due process cases. U.S. v. Locke, ___ U.S. ___, 105 S.Ct. 1975, 85 L.Ed.2d 64 (1985). The decision below improperly limits the power of the Virginia Legislature to passing retroactive legislation affecting procedural matters only.

The public policy of the Virginia statute, which is to encourage settlements and the efficient resolution of lawsuits, also is frustrated by the Potomac Hospital decision. Without the protection from subsequent liability for contribution, joint tort-feasors are much less likely to seek settlements. Most importantly,

plaintiffs will not agree to settle claims if the result of their settlement is to abolish their causes of action against non-settling defendants. Even if the provision in §8.01-35.1 discharging a settling tort-feasor from liability for contribution is struck, the remainder of the statute providing that release of one joint tort-feasor does not release all should be upheld.

ARGUMENT

I. THE DECISION BELOW IS AN UNPRECEDENTED RESTRICTION OF THE LEGITIMATE LEGISLATIVE POWERS OF THE VIRGINIA GENERAL ASSEMBLY, BECAUSE RETROACTIVE APPLICATION OF CODE OF VIRGINIA SECTION 8.01-35.1, WHICH AFFECTS A JOINT TORT-FEASOR'S RIGHT OF CONTRIBUTION, DOES NOT CONSTITUTE A DENIAL OF DUE PROCESS.

A. The decision below is inconsistent with decisions of the United States Supreme Court, which require only that retroactive application of statutes serve a "rational legislative purpose" to survive due process scrutiny.

The central issue presented is whether the retroactive application of § 8.01-35.1 results in an unconstitutional denial of a joint tort-feasor's right to contribution. The Act was passed in 1979 and subsection D, concerning the retroactive effect, was added in 1982.[2] The

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[2]The Code of Virginia, §8.01-35.1, reads as follows: Effect of release or (Footnote Continued)

effect of the statute is to abrogate the

(Footnote Continued)
covenant not to sue in respect to liability and contribution.

A. When a release or a covenant not to sue is given in good faith to one of two or more persons liable in tort for the same injury, or the same property damage or the same wrongful death:

1. It shall not discharge any of the other tort-feasors from liability for the injury, property damage or wrongful death unless its terms so provide; but any amount recovered against the other tort-feasors or any one of them shall be reduced by any amount stipulated by the covenant or the release, or in the amount of the consideration paid for it, whichever is the greater. A release or covenant not to sue given pursuant to this section shall not be admitted into evidence in the trial of the matter but shall be considered by the court in determining the amount for which judgment shall be entered; and

2. It shall discharge the tort-feasor to whom it is given from all liability for contribution to any other tort-feasor.

B. A tort-feasor who enters into a release or covenant not to sue with a claimant is not entitled to recover by way of contribution from another tort-feasor whose liability for the injury, property damage or wrongful death is not extinguished by the release or covenant not to sue, nor in respect to any amount paid by the tort-feasor which is in excess

(Footnote Continued)

common law rule that the release of one tort-feasor operated as a release of all tort-feasors. In the decision below, Potomac Hospital Corp. v. Dillon, 229 Va. ____, 329 S.E.2d 41 (1985), the Virginia Supreme Court held that the statute could not be applied retroactively to adversely affect the hospital's right of contribution. The Court framed its analysis broadly by determining whether the provision "violates constitutional due process."

Although the decision below is not explicit on whether it relies on the

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(Footnote Continued)
of what was reasonable.

C. A release or covenant not to sue given pursuant to this section shall be subject to the provisions of §§8.01-55 and 8.01-424.

D. This section shall apply to all such covenants not to sue executed on or about July 1, 1979, and to all releases executed on or after July 1, 1980, regardless of the date the causes of action affected thereby accrued.

Federal or State Constitution, all indications are that the decision rests upon the due process clause of the Fourteenth Amendment to the United States Constitution. None of the courts below discusses or mentions the State Constitution. All cases cited in the decision below that deal with the due process issue are grounded in the Federal Constitution. In addition, the Virginia Supreme Court has held that if an act does not violate the Federal Constitution, it will not offend the Virginia Constitution, and vice versa. Reynolds v. Milk Commission, 163 Va. 957, 963, 179 S.E. 507 (1935). Due process violations under the Virginia Constitution are subject to the same standards as under the United States Constitution. See Town of Danville v. Pace, 66 Va. (26 Gratt.) 1 (1874). Therefore, when the decision below speaks in terms of constitutionality, constitutional questions and due

process rights, it is referring to these terms as interpreted under the Federal Constitution.

The Virginia Court's expansion of the constitutional prohibition to include inchoate substantive rights as well as vested rights is inconsistent with recent statements by this Court. When faced with a due process challenge to the retroactive application of a statute in Pension Benefit Guaranty Corp. v. R. A. Gray & Comp., ____ U.S. ____, 104 S.Ct. 2709, 81 L.Ed2d 601 (1984), the Supreme Court ruled that Congress could enact a statute that retroactively affected the right to pension plan benefits because the statute served a rational legislative purpose. Pension Benefit, supra 104 S.Ct. 2709, at 2712. The right affected in the Pension case was clearly substantive as opposed to procedural. This "rational basis" analysis was also applied in U.S. v. Locke,

____ U.S. ____, 105 S.Ct. 1785 85 L.Ed.2d 64 (1985) and in National Railroad Passenger Corp. v. Atchison, Topeka and Sante Fe Railway Co., et al., ___ U.S. ___, 105 S.Ct. 1441, 84 L.Ed.2d 432 (1985). In the latter case, the United States Supreme Court reiterated this rule: "The party asserting a Fifth Amendment due process violation must overcome a presumption of constitutionality." Further, Justice Marshall, writing for the majority, quoted Pension and Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 96 S.Ct. 2882 (1976), emphasizing that the person attacking the retroactive statute must show that "the legislature has acted in an arbitrary and irrational way." National Railroad Passenger Corp., supra 105 S.Ct. 1441, at 1455.

The General Assembly of Virginia has acted rationally in enacting §8.01-35.1, which does not abolish contribution, but

in effect merely revises the method for its computation. Although the settling defendant is released from further liability, the effect of the statute is to reduce the judgment by the amount the plaintiff has already received. In addition, the major thrust of the statute is to allow plaintiffs to release one tort-feasor, without losing the right to proceed against those who choose not to settle. It is clear that the legislature sought to replace the impractical common law approach with a more rational method.

B. The right of contribution is an inchoate right, not subject to the constitutional protection afforded to vested rights.

In arriving at its decision, the Court below determined that the right to contribution is a substantive right. Potomac Hospital, supra 329 S.E.2d 41 (quoting Shiflet v. Eller, 228 Va. 115,

121, 319 S.E.2d 750, 754 (1984). The Commonwealth does not contest this designation, but respectfully submits that the Court's holding is based on an erroneous statement of the appropriate rule. As previously held by the Honorable Walter E. Hoffman, United States District Judge for the Eastern District of Virginia, a retroactive statute cannot interfere with or divest vested rights. Stancil v. United States, 200 F. Supp. 36, 44 (E.D. Va. 1961). When the legislature manifests its express intent to make a statute retroactive, however, and such application does not affect a contractual or a vested right, then it is permissible. Eaton v. Davis, 176 Va. 330, 10 S.E.2d 893 (1940); Bain v. Boykin, 180 Va. 259, 23 S.E.2d 127 (1942); Hagen v. Hagen, 205 Va. 791, 139 S.E.2d 821 (1965); 4A M.J. Constitutional Law §47 (Repl. Vol. 1983).

The right to contribution, while substantive, is clearly not vested until a disproportionate settlement or judgment is reached. First Virginia Bank - Colonial v. Baker, 225 Va. 72, 81, 301 S.E.2d 8, 13 (1983). In Laws v. Spain, 312 F.Supp 315, 318 (E.D. Va. 1970), Judge Kellam held that "the right to contribution arises when one joint tort-feasor has paid a claim for which the other joint tort-feasor is liable." In Potomac Hospital, the "cause of action" for contribution arose in 1977 at the time of the jointly negligent acts. Although derivative from the cause of action, the right of contribution did not become a vested "right of action" until the release was signed in July 1983. The vesting of the right to contribution thus did not occur until after the passage of §8.01-35.1 Subsection D, which became effective in 1982. Therefore, in the case of Potomac Hospital

there was no retroactive effect on a vested right.

C. The decision below improperly limits the prerogative of the Virginia General Assembly.

If this Court allows the Potomac Hospital decision to stand, it will significantly infringe upon the Virginia General Assembly's legitimate exercise of its legislative powers. Although the General Assembly infrequently passes laws retroactively affecting substantive rights, this body has always had the power to enact such legislation within long-observed constitutional guidelines. The Court's decision in Potomac Hospital reduces this legislative prerogative and in effect, restricts the General Assembly's ability to pass laws with retroactive application to matters only affecting strictly procedural rights.

The Potomac Hospital decision indicates that not only may the legislature not retroactively affect substantive rights by express intent, but that it cannot do so even with regard to a statutory right that does not exist except by the will of the legislature. This restriction is again contrary to the great weight of authority. See for example, the discussion in 1A Sutherland Stat. Const. §23.35 (4th Ed.), citing Baltimore and P. R. Co. v. Grant, 98 U.S. 398, 25 L.Ed 231 (1878).

Before §8.01-35.1 went into effect on July 1, 1979, a member of the General Assembly requested an opinion from the Attorney General of Virginia as to whether or not the statute would be applicable to claims that arose prior to the enactment of the statute. The Attorney General of Virginia concluded that the new statute would be applicable ". . . since such an

application would disturb no vested right and would be in accord with the rules of statutory construction." 1978-1979 Report of the Attorney General at 247.

This Court should grant the Petition for a Writ of Certiorari in order to review the decision below in light of (1) long-standing constitutional authorities to the contrary, and (2) the detrimental impact that the decision places on the well-founded legislative authority customarily and legitimately entrusted to the hands of the General Assembly of Virginia and other legislative bodies.

II. THE FAILURE TO ENFORCE SECTION §8.01-35.1 OF THE CODE OF VIRGINIA IS CONTRARY TO PUBLIC POLICY, WHICH FAVORS THE SETTLEMENT AND EFFICIENT RESOLUTION OF LAWSUITS.

Public policy in Virginia favors settlements of lawsuits. Crandell v. U.S., 703 F.2d 74, 75 (4th Cir. 1983), 4A M.J. Compromise & Settlement, §4 (Supp.

1984). Section 8.01-35.1 favors and encourages settlement by joint tort-feasors who are willing to settle out of court. See Hayman v. Patio Products, Inc., 226 Va. 482, 311 S.E.2d 752 (1984). Thus, plaintiffs are able to settle with willing defendants without fear of thereby releasing other recalcitrant or culpable defendants from liability. This encourages settlement of lawsuits and judicial economy, especially in increasing areas of complex litigation involving multiple parties.

The intent of the drafters of the law on which the Virginia statute is based was to encourage settlements. Uniform Contribution Among Tort-Feasors Act §4, Commissioner's Comment, 12 U.L.A. 98-99 (1955). This also was the intent of the Virginia General Assembly since passage of the statute abrogated the common law rule that release of one tort-feasor is a release of

all. The statute provides a benefit to the plaintiff by enabling him to continue his efforts against non-settling tort-feasors. The settling tort-feasor is benefited in that he is immune from further contribution.

The common law governing federal cases regarding the release of joint tort-feasors is in line with Virginia's statute. The well-established approach was applied in a recent case in the United States District Court for the Eastern District of Va., Mann v. H. K. Porter and Southern Textile Corp., No. 83-477-N Civ. (E.D. Va. July 8, 1985). The Court ruled that under federal common law, release of one defendant does not release all. Mann, supra at p. 10. In addition, the Court took the opportunity to discuss the Virginia statute in light of Shiflet and Dillon, by noting that the right of contribution, although derivative from a

cause of action, is an inchoate right. Further, the opinion contains strong language concerning the public policy behind the federal common law rule:

> . . . [T]he practical effect of adopting defendants' argument [supporting the release of remaining tort-feasors after release of one] would be disastrous, not only for plaintiffs, but for this Court. In addition to the obvious inequity of requiring dismissal of all current cases when a plaintiff had settled with at least one defendant, despite such result being exactly contrary to all parties' intentions, a holding such as the defendants suggest would make settlements in future asbestos cases impossible... This holding would result in a tremendous waste of resources and time for plaintiffs, defendants and this Court, as all cases would have to be tried to completion.

Mann, supra at 13.

The failure to enforce §8.01-35.1 is clearly at odds with public policy in Virginia as enunciated by the legislature and, in addition, is contrary to the approach favored by the federal courts in

the Fourth Circuit. Many complex claims in the area of antitrust, asbestos and other toxic torts or environmental areas arose prior to the enactment of Section 8.01-35.1. The inability to reach reasonable settlements with individual defendants in these cases will force unnecessarily expensive, protracted and burdensome trials on the courts of this Commonwealth. This result is not intended or required by the sound and well-established principles of constitutional law.

III. ASSUMING A DUE PROCESS VIOLATION IS FOUND, SECTION 8.01-35.1 OF THE CODE OF VIRGINIA IS ONLY PARTIALLY INVALID AND THE REMAINDER OF ITS PROVISIONS, WHICH PROMOTE SETTLEMENT OF COMPLEX LITIGATION, SHOULD STAND.

A. Striking the portion of the statute concerning the retroactive discharge of contribution does not prevent the statute from accomplishing its purpose of encouraging settlement of lawsuits.

The major concern of the Court in the decision below was its conclusion that the retroactive application of §8.01-35.1 was unconstitutional to the extent that the rights of joint tort-feasors to contribution from the settling tort-feasor would be abridged. This "abridgement" results from the interaction of Code §8.01-35.1.A(2), which discharges the settling tort-feasor from "all liability for contribution to any other tort-feasor", and §8.01-35.1.D which gives this section its retroactive effect.

Assuming that the retroactive appli-

cation of that portion of the statute which abridges other tort-feasors' rights of contribution is unconstitutional, this portion may be struck while the remainder of §8.01-35.1, which provides that the release of one does not release all, remains in effect. The United States Supreme Court has recognized that a statutory provision is presumed severable if what remains after severance is fully operative as law. Immigration and Naturalization Service v. Chadha, 462 U.S. 919, 103 S.Ct. 2764, 2775 (1983).

If the invalid provision is severable from the remainder of the statute, it may be ignored as long as the remaining portions are sufficient to accomplish their purpose in accordance with the legislative interest. It is only when the void portion is the inducement to the passage of the act or is so interwoven in its texture as to prevent the statute from

becoming operative in accordance with the will of the legislature that the entire statute is invalid. King v. County of Arlington, 195 Va. 1084, 81 S.E.2d 587 (1954), Hannoboss v. Maryland Casualty Co., 169 Va. 559, 194 S.E.2d 808 (1938).

B. Failure to allow the remainder of the statute to stand reinstates the common law rule that the legislature intended to abrogate.

In the absence of a severability provision in the statute, the burden of proving severability devolves upon the supporter of the legislation. Nevertheless, even in the absence of a severability clause, "the test of severability is whether the legislature would be satisfied with what remains after the invalid part has been eliminated." City of Portsmouth v. Citizens Trust Co., 216 Va. 695, 698, 222 S.E.2d 532, 535 (1976). The Commonwealth asserts that the legislature is

more satisfied with the remaining provisions previously mentioned than the harsh common law rule where "there is an obvious lack of sense and justice in a rule which permits the entire burden of a loss for which two defendants were equally, unintentionally responsible, to be shouldered onto one alone according to the plaintiff's whim". W. PROSSER, Handbook of The Law of Torts §46, at 291 (4th Ed. 1971).

By ruling invalid the provision which discharges the tort-feasor's liability from contribution, §8.01-35.1.A(2), the benefit provided the plaintiff remains. The plaintiff can still proceed against other tort-feasors. Therefore, the statute continues to encourage settlements.

The central provision regarding release should not fall victim to the Court's decision that secondary aspects of

the statute are invalid. A statute may contain constitutional and unconstitutional provisions that may be perfectly distinct and separable so that some may stand and others may fall; and if, when the unconstitutional portion of the statute is rejected, the remaining portion reflects the legislative will, is complete in itself, is capable of being executed independently of the rejected portion, and in all other respects is valid, such remaining portion will be upheld and sustained. Delardas v. County Court, 217 S.E.2d 75 (W.Va. 1975), see also, Immigration and Naturalization Service v. Chadha, 462 U.S. 919, 103 S.Ct. 2764, 2775 (1983). Whether a statute contains a saving provision or not, the test of its separability is the interest of the lawmakers. Hannoboss, supra at 571. The intent of the lawmakers, in reversing the harsh common law rule, was to allow for

settlement without extinguishing a plaintiff's rights against other tort-feasors. This is still provided by the remainder of §8.01-35.1, and accordingly, it should be upheld.

CONCLUSION

It is on the basis of these arguments that the Commonwealth joins the petitioner in requesting that a writ of certiorari be issued to review the judgment and opinion of the Virginia Supreme Court.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

No. 85-388

JOSEPHINE A. DILLON, Committee of HILDA NADINE AMIDON, a legally incompetent person,
Petitioner,

v.

POTOMAC HOSPITAL CORPORATION,
Respondent.

AMICUS CURIAE
MOTION AND BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

No.

JOSEPHINE A. DILLON, Committee of
HILDA NADINE AMIDON, a legally
incompetent person,
Petitioner,

v.

POTOMAC HOSPITAL CORPORATION,
Respondent.

MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

Now come 371 individuals (See Appendix), by counsel, and pursuant to Rule 36.1 of the Rules of the Supreme Court of the United States, would respectfully request leave of this Honorable Court to file an *amicus curiae* brief in support of the Petition for a Writ of Certiorari to the Supreme Court of Virginia in the above-styled matter. In support of this motion, the *amicus curiae* petitioners would respectfully show the following:

1. Your Petitioners are plaintiffs in asbestos products liability litigation in the United States District Court for the Eastern District of Virginia wherein multiple asbestos products manufacturers are alleged to be joint tortfeasors whose defective

products are alleged to have caused the plaintiffs to contract permanently disabling and/or fatal diseases of asbestosis, lung cancer, and mesothelioma.

2. Each Plaintiff has partially settled his claim against one or more of those asbestos manufacturers, pursuant to the presumed validity and constitutionality of Virginia's Partial Settlement Statute, Sec. 8.01-35.1 of the Virginia Code.

3. Multiple non-settling Defendants remain in each Plaintiff's personal injury or wrongful death case.

4. Virginia Code Sec. 8.01-35.1 was enacted by the Virginia General Assembly in 1979 to permit partial settlements in complex multi-party tort litigation and to abolish the anachronistic common law rule that settlement with one joint tortfeasor released all non-settling joint tortfeasors.

5. The effect of a covenant not to sue pursuant to the Virginia Statute is that it discharges the tortfeasor to whom it is given from all liability for contribution from any other tortfeasor.

6. In 1982 the statute was expressly amended by the Virginia General Assembly to make it apply to all pending causes of action, irrespective of when the cause of action accrued. (Sec. 8.01-35.1D, VA. CODE ANN.)

7. For five years after its enactment, numerous State and Federal courts, law review commentators, and the Virginia Attorney General opined that this statute was a legitimate and constitutional exercise of legislative prerogative because it was "remedial" and did not adversely affect any "vested rights."

8. In *Dillon v. Potomac Hospital Corporation*, 229 Va. _____, 329 S.E. 41 (1985), the Virginia Supreme

Court found that "inchoate causes of action for contribution" between joint tortfeasors arise at the time that the joint tortfeasors committed their negligent acts; that although this inchoate cause of action for contribution is not a "vested right," it is nevertheless a "substantive right" that could not be retroactively impaired without violation of the constitutional protection of "due process." The Virginia Court then reversed a jury verdict against the Potomac Hospital for medical malpractice that occurred in 1977 because in 1983 the Plaintiff (in reliance upon Sec. 8.01-35.1D) had partially settled with several joint tortfeasors.

9. As in *Dillon, supra*, the negligent acts of the Defendants in your Petitioners' asbestos products liability actions occurred prior to the enactment of Sec. 8.01-35.1 of the Virginia Code. The non-settling Defendants in these cases, therefore, contend that your Petitioners' cases should be dismissed pursuant to the common law rule that release of one joint tortfeasor releases all non-settling joint tortfeasors.

10. Application of *Dillon*'s unique, unprecedented, and erroneous interpretation of "due process" to your Petitioners, all of whose partial settlements were also made after the enactment of Sec. 8.01-35.1D of the Virginia Code, would have at least three far-reaching and tragic effects:

First, it would result in the unjust and unanticipated dismissal of hundreds of lawsuits against non-settling Defendants who would receive a windfall for their recalcitrance.

Secondly, it will effectively foreclose any reasonable opportunity for hundreds of other asbestos victims--all of whom have cases pending in the United States District Court pursuant to diversity jurisdiction--to settle their claims in the future,

thereby forcing unnecessary, expensive and time-consuming litigation upon the Federal Courts as well as the parties.

Thirdly, it will eliminate the ability of the Virginia General Assembly, and possibly other states, to pass remedial legislation on a variety of social, economic, judicial, or environmental problems in which affected parties have "inchoate" or "substantive" but not "vested" rights.

Counsel for the Petitioner, Josephine A. Dillon, consented to the filing of this Motion for Leave to File *Amicus Curiae* Brief in Support of Petition for a Writ of Certiorari to the Supreme Court of Virginia, but the attorneys for the Respondent, Potomac Hospital Corporation, have refused to consent to the filing of a brief by your *amicus curiae* Petitioners.

WHEREFORE, your Petitioners hereby request leave to file an *amicus curiae* brief in support of the Petitioner, Josephine A. Dillon, Committee of Hilda Nadine Amidon, to the opinion of the Virginia Supreme Court in *Dillon v. Potomac Hospital, supra.*

Respectfully submitted,

By

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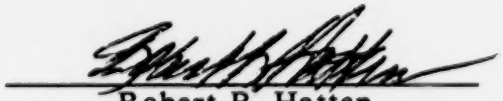
CERTIFICATE

I hereby certify that a true copy of the foregoing Motion for Leave to File *Amicus Curiae* Brief in Support of Petition for a Writ of Certiorari to the Supreme Court of Virginia was mailed by first-class mail, postage prepaid on the 9th day of October, 1985, to the following persons: Frank J. Ceresi, Esq., 2300 South 9th Street, Suite 112, Arlington, VA 22204; Robert Loftus, Esq., Miles & Stockbridge, 4069 Chain Bridge Road, Fairfax, VA 22030; and The Hon. William G. Broaddus, Acting Attorney General, 101 N. 8th Street, Richmond, VA 23219.



Robert R. Hatten

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

No. 85-388

JOSEPHINE A. DILLON, Committee of
HILDA NADINE AMIDON, a legally
incompetent person,
Petitioner,

v.

POTOMAC HOSPITAL CORPORATION,
Respondent.

AMICUS CURIAE BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

Your *amicus curiae* Petitioners adopt the Petition for Writ of Certiorari to the Supreme Court of Virginia filed by Josephine A. Dillon. This *amicus curiae* brief is submitted in support of and in addition to the reasons heretofore set forth by the Petitioner for granting the writ.

INTEREST OF THE *AMICUS CURIAE* PETITIONERS

Your *amicus curiae* Petitioners are 371 individuals who are plaintiffs in asbestos products liability litigation in the United States District Court for the Eastern District of Virginia wherein multiple asbestos products manufacturers are alleged to be joint tortfeasors whose defective products are alleged to have caused the plaintiffs to contract

permanently disabling and/or fatal diseases of asbestosis, lung cancer, and mesothelioma.

Each *amicus curiae* Petitioner has partially settled his claim against one or more of those asbestos manufacturers, pursuant to the presumed validity and Constitutionality of Virginia's Joint Tortfeasor Release Act, Sec. 8.01-35.1 of the Virginia Code.

This statute was enacted by the Virginia General Assembly in 1979 to permit partial settlements in complex multi-party tort litigation and to abolish the anachronistic common law rule that settlement with one joint tortfeasor released all non-settling joint tortfeasors. In 1982 the statute was expressly amended to make it apply to all ending causes of action irrespective of when the cause of action accrued. Sec. 8.01-35.1, VA. CODE ANN.

In *Dillon v. Potomac Hospital Corporation*, 229 Va. _____, 329 S.E.2d 41 (1985), the Virginia Supreme Court found that "inchoate causes of action for contribution" between joint tortfeasors arise at the time that the joint tortfeasors committed their negligent acts; that although this inchoate cause of action for contribution is not a "vested right," it is nevertheless a "substantive right" that could not be retroactively impaired without violation of the Constitutional protection of "due process." The Court therefore held that Sec. 8.01-35.1D was unconstitutional.

As in *Dillon, supra,* the negligent acts of the Defendants in your Petitioners' asbestos products liability actions occurred prior to the enactment of Sec. 8.01-35.1 of the Virginia Code. The non-settling Defendants in these cases, therefore, contend that your Petitioners' cases should be dismissed pursuant to the common law rule that release of one joint

tortfeasor releases all non-settling joint tortfeasors.

The interpretation of due process as set forth in the *Dillon* case, *supra*, is unprecedented and erroneous for the reasons that are hereinafter set forth. Unless this opinion of the Virginia Supreme Court is overruled, it will result in the unjust and unanticipated dismissal of hundreds of lawsuits against non-settling Defendants who will receive a windfall for their recalcitrance. Further, unless *Dillon* is overruled, it will effectively foreclose any reasonable opportunity for hundreds of other asbestos victims, all of whom have cases pending in the United States District Court to settle their claims in the future, thereby forcing unnecessary expensive and time-consuming litigation upon the Federal Courts as well as the parties.

SUMMARY OF THE ARGUMENT

In *Dillon v. Potomac Hospital Corp., supra,* the Virginia Supreme Court has found that Sec. 8.01-35.1D of the Virginia Code is unconstitutional as applied to inchoate causes of action for contribution which pre-existed the enactment of the statute. This opinion erroneously fails to apply the "rational basis" test as set forth in previous decisions of this Court for evaluation of whether or not retroactive state laws violate the due process clause of the Fourteenth Amendment of the United States Constitution. Should the Virginia Supreme Court be correct in finding Sec. 8.01-35.1D to be unconstitutional, its ruling should be applied prospectively only so as to avoid severe prejudice to those parties who relied upon the presumed Constitutionality of the statute.

ARGUMENT

1. "Inchoate causes of action" are not entitled to due process protection from expressly retroactive state laws.

The limits of due process protection against retroactive statutes has been clearly defined by this Court in numerous recent decisions. *See, Usery v. Turner Elkhorn Mining Corp.*, 428 U.S. 1 (1976), *Pension Benefit Guaranty Corp. v. R. A. Gary & Co.*, _____ U.S. _____ 104 Sup. Ct. 2709 (1984); and *United States v. Locke*, _____ U.S. _____ 105 Sup. Ct. 1785 (1985). These cases have established a "rational basis" test for determining whether retroactive legislation is Constitutionally permissible. In *Usery, supra*, Justice Marshall explained:

> [L]egislative Acts . . . come to the Court with a presumption of Constitutionality and . . . the burden is on one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way.
>
> . . . .
>
> [L]egislation readjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations (citations omitted). This is true even though the effect of the legislation is to impose a new duty or liability based on past acts.

428 U.S. at 15-16. This holding was reiterated in *Pension Benefit Guaranty Corp., supra*, where this court held that:

> Provided that the retroactive application of a statute is supported by a legitimate legislative purpose furthered by rational means, judgments about the wisdom of such legislation remains within the exclusive province of the legislative and executive branches.
>
> . . . .
>
> The retroactive aspects of legislation . . . must meet the test of due process . . . but that burden is met simply by showing that the retroactive application of the legislation is itself justified by a rational legislative purpose.

104 Sup. Ct. at 2718.

Determination of whether new legislation adversely affects "vested rights", "substantive rights" or "inchoate rights" is irrelevant, if the "rational purpose" test is satisfied. *See, United States v. Locke, supra.*

In 1979 the Virginia General Assembly abolished the common law rule that release of one joint tortfeasor released all other joint tortfeasors. Sec. 8.01-35.1 VA. CODE ANN. This statute provided that the effect of a release or covenant not to sue is that "it shall discharge the tortfeasor to whom it is given from all liability for contribution to any other tortfeasor." Sec. 8.01-35.1A.2 VA. CODE ANN. The *quid pro quo* to the non-settling joint tortfeasor is a reduction of the jury's verdict in an amount equal to the sum paid by the settling tortfeasor. Sec. 8.01-35.1A.1. In 1982 the Virginia General Assembly amended this statute to make it expressly retroactive to all covenants not to sue executed after July 1, 1979 "regardless of the date the causes of action affected thereby accrued." Sec. 8.01-35.1D VA. CODE ANN.

The legitimate and rational purpose of Sec. 8.01-35.1D of the Virginia Code is obvious and compelling: it encourages voluntary settlements in complex litigation. This objective helps to preserve the time and financial resources of both the litigants and Courts. As the Virginia Supreme Court observed in *Hayman v. Patio Products, Inc.*, 226 Va. 482 (1984),

> We believe the General Assembly intended to change a rule of law which tended to reward a recalcitrant tortfeasor at the expense of a joint tortfeasor who was willing to settle out of Court. . . . The statute facilitates prompt settlement, payment and discharge of paying tortfeasors without releasing those non-paying joint tortfeasors who prefer to have their liability determined in litigation, with its attendant delays.

226 Va. at 487.

The rational purpose accomplished by Sec. 8.01-35.1D of the Virginia Code in the settlement of complex tort litigation is also confirmed by the fact that it is identical to the Federal rule that was first announced by this Court in *ARO Manufacturing Co. v. Convertible Top Replacement*, 377 U.S. 476 (1964).[1] There, Justice Brennan observed that the common law rule which required release of non-settling joint tortfeasors as a penalty for partial settlement, "has been repudiated by statute or decision in many, if not most, states and by the overwhelming weight of scholarly authority." 388 U.S. at 501. The Court then abolished the applicability of the anachronistic common law rule in Federal tort litigation. In so doing, the Court followed well-settled case law that

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[1]Accord, Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321, 348 (1971).

> [a] person has not property, no vested interest, in any rule of the common law. . . . [The] Constitution does not forbid the creation of new rights or the abolition of old ones recognized by the common law, to attain a permissible legislative object, . . . despite the fact that "otherwise settled expectations" may be upset thereby. (citations omitted)

Duke Power Co. v. Carolina Environmental Study Group, Inc., 438 U.S. 59, 88 n.32 (1978).

In *Dillon v. Potomac Hospital, supra*, the Virginia Supreme Court held that the retroactive application of Sec. 8.01-35.1 to "inchoate causes of action for contribution"[2] which existed prior to the enactment of the statute violated due process and was, therefore, unconstitutional. This unprecedented decision fails to mention or discuss the "rational basis" test or any of the pertinent opinions of this Court which have heretofore defined the limits of due process. Instead, the Virginia Court relied upon a previous state decision which held that the 1979 version of Sec. 8.01-35.1 (which was not expressly retroactive) could not be implicitly applied retroactively if it affected pre-existing substantive rights. *See*, Sec. 8.01-35.1 VA. CODE ANN.; *Shiflet v. Eller* 228 Va. 115, 319 S.E.2d 750 (1984). *Shiflet* involved a matter of statutory interpretation, not Constitutional law, but the opinion had cited with approval a United States District Court opinion that retroactive application of Sec. 8.01-35.1 constitutes a "violation of the non-settling Defendants' guarantee of due

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[2]The Virginia Court found that an inchoate cause of action for contribution arises at the time of the jointly negligent acts, not the time that a settlement or verdict results in payment of a disproportionate share of the liability.

process under the law of the United States Constitution." *Carickhoff v. Badger Northland, Inc.*, 562 F. Supp. 160, 165 (W.D. Va. 1983).[3] Unfortunately, the *Carickhoff* decision also failed to mention the "rational basis" test or any of the pertinent opinions of this Court which have clearly defined the limits of due process.

The Virginia Supreme Court's blind acceptance of the erroneous interpretation of the due process clause of the Fourteenth Amendment as contained in the *Carickhoff* decision has led that Court to an unjust and unnecessary end. Had the Court applied the proper standards, i.e., the "rational basis" test, to determine if retroactive application of Sec. 8.01-35.1D was Constitutional, an entirely different result would have occurred.

As in *Dillon*, your *amicus curiae* Petitioner executed covenants not to sue in reliance upon the presumed Constitutionality of Sec. 8.01-35.1D, a statute which served an obviously rational purpose of expediting complex litigation. Unless *Dillon* is overruled, there will be at least three tragic and far-reaching effects:

First, it will result in the unjust and unanticipated dismissal of hundreds of lawsuits against non-settling Defendants who would receive a windfall for their recalcitrance.

Secondly, it will effectively foreclose any reasonable opportunity for hundreds of other asbestos

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[3]The Carickhoff decision is contrary to a previous opinion of the Virginia Attorney General, contrary to numerous Virginia Circuit Court opinions, contrary to numerous law review commentaries, and contrary to other United States District Court opinions. See, authorities infra., at p. 9-12. See also, Barwick v. Celotex Corp., 736 F.2d 946 (4th Cir. 1984).

victims--all of whom have cases pending in the United States District Court pursuant to diversity jurisdiction--to settle their claims in the future, thereby forcing unnecessary, expensive and time-consuming litigation upon the Federal Courts as well as the parties.

Thirdly, it will eliminate the ability of the Virginia General Assembly, and possibly other states, to pass remedial legislation on a variety of social, economic, judicial, or environmental problems in which affected parties have "inchoate" or "substantive" but not "vested" rights.

2. If the *Dillon* opinion is correct, it has established a new Constitutional principle which was not in existence at the time that the Petitioners relied upon the presumed validity of Sec. 8.01-35.1D of the Virginia Code; consequently, this new Constitutional standard should be applied prospectively only.

In *Dillon v. Potomac Hospital Corp., supra.*, the Virginia Supreme Court conceded that the inchoate cause of action for contribution among joint tort-feasors is not a "vested right"; however, the Court found that this inchoate cause of action for contribution was a "substantive right" which could not be retroactively impaired by new legislation without violation of due process.

This holding was particularly surprising because when Sec. 8.01-35.1 of the Code of Virginia was enacted in 1979, the uniform case law in Virginia regarding the Constitutionality of retroactive legislation was that such legislation was Constitutional unless it affected "vested rights." *See, Town of Danville v. Pace*, 25 GRATT 1 (1874); *Humble Oil v. Copley*, 213 Va. 449 (1972); *Brown Committee v.*

Western State, 110 Va. 321, 66 S.E. 49 (1909); *Bain v. Boykin*, 180 Va. 259 (1942); and *Eaton v. Davis*, 176 Va. 330 (1940).[4] In each of these previous decisions of the Supreme Court of Virginia, "substantive rights" of the litigants had been altered by retroactive legislation which abolished rights or duties which existed at the time of the transactions which formed the basis of the litigation.

Indeed, in *Town of Danville v. Pace*, *supra*, the Virginia Supreme Court held:

> Even though a statute may take away vested rights by reason of its retrospective operation, it cannot for that reason merely be treated as repugnant to any provisions contained in the Constitution of the United States.
>
> . . . .
>
> The next inquiry is as to the Constitution of Virginia . . . that the legislature has the constitutional power to pass retrospective laws, laws affecting vested rights, no one will deny who is familiar with the jurisprudence of the country.
>
> . . . .
>
> There is no such thing as a vested right to do wrong.

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[4]This general rule was also well-settled in most other states. See, generally, "Retrospectivity and Retroactivity of Civil Legislation Reconsidered," by Gregory J. DeMars, Ohio N.U.L. Rev., Vol. 10:253-275 (1983); See, e.g., Carl v. Bryant Air Conditioning Company, 331 N.W.2d 456 (1982).

25 GRATT at 10-11, 15. This case has never been overruled and the Virginia Supreme Court failed to mention it in the *Dillon* opinion.

The unprecedented character of the *Dillon* decision is also illustrated by the previous reaction of the Virginia Courts, commentators, and public officials to the Constitutionality of Sec. 8.01-35.1:

In May 1979, the Attorney General of the State of Virginia was asked to render an opinion as to whether Sec. 8.01-35.1 was Constitutional. The Attorney General opined that the statute did not retroactively impair any vested rights, that it was remedial, and that it was Constitutional. He also concluded that the statute would apply "even where the cause of action arose before July 1, 1979." See Appendix D to Petitioner's Brief.

In 1980 a law review commentator remarked that "there is no problem with a retroactive application" of Sec. 8.01-35.1 because any inchoate right of contribution that may exist prior to the effective date of the statute "cannot be a vested right." "The Covenant Not to Sue: Virginia's Effort to Bury the Common Law Rule Regarding the Release of Joint Tortfeasors", Vol. 14 U. Rich. L.R. 809, 829-30 (1980).

Also in 1980 a Virginia Circuit Court ruled that Sec. 8.01-35.1 could be properly applied to a cause of action that arose prior to the effective date of the statute. The Defendants appealed to the Virginia Supreme Court and alleged as a primary reason for reversal that the 1979 statute was unconstitutional because it retroactively impaired the "substantive rights" of the Defendants. On March 12, 1982, the Virginia Supreme Court found no reversible error and denied the Petition for a Writ of Certiorari, thereby affirming the Circuit Court opinion. *Esco Elevator Company, Inc. v. Barbara Dunn*, (Circuit Court for the

City of Richmond, Virginia, December 1980, Rec. No. 810560) *(Petition for Appeal denied 3/12/82, Petition for Rehearing denied 4/30/82).*

In 1982 a United States District Court for the Western District of Virginia ruled that "the date of the release," not the "date that the cause of action arose" determines whether release of one joint tortfeasor releases all. *Statzer v. King Kutter Corp.*, 550 F.2d 1062, 1065 (W.D. Va. 1982).

In January 1984, the Virginia Supreme Court expressly approved Sec. 8.01-35.1 of the Virginia Code and held:

> We will not attribute . . . a useless gesture to the General Assembly. We believe the General Assembly intended to change a rule of law which tended to reward a recalcitrant tortfeasor at the expense of a joint tortfeasor who was willing to settle out of Court. We believe the legislature's intent, as shown by the statutory language, was to promote the use of a covenant not to sue by permitting payment thereunder and discharge of one joint tortfeasor without causing the covenant to effect the release of the other joint tortfeasors. *Hayman v. Patio Products, Inc., supra.*

226 Va. at 487. The Court then proceeded to expressly apply the 1979 statute to a cause of action that accrued in 1977.

In April 1984, the Circuit Court of Prince William County expressly approved the retroactive application of Sec. 8.01-35.1 to a cause of action that accrued in 1977. *Dillon v. Potomac Hospital Corp.*, Memo. Op. (4/16/84). (Appendix A to Petitioner's Brief)

Finally, in May 1984, the United States District Court for the Eastern District of Virginia expressly approved the application of Sec. 8.01-35.1 to an asbestos settlement where the Plaintiff's exposure had ended in 1970, but the cause of action had not been discovered until 1980. *Lydia Cole, Executrix v. Raymark Industries, Inc.*, (see transcript on Motion for Summary Judgment dated May 3, 1984).

Your Petitioners have executed approximately 2,000 separate covenants not to sue[5] with various asbestos manufacturers for asbestos-induced injuries and deaths resulting from negligent acts that occurred prior to the enactment of Sec. 8.01-35.1 of the Virginia Code. Each of these covenants was executed *after* the 1982 amendment to Sec. 8.01-35.1 by which the Virginia General Assembly made the statute expressly retroactive. Your Petitioners, therefore, had no notice that the Constitutional standard of due process as previously established by both this Court and the Virginia Supreme Court would be retroactively changed by the surprising and unprecedented decision of the Virginia Supreme Court in *Dillon*.

The retroactive application of *Dillon*'s new Constitutional standard to your *amicus curiae* Petitioners will result in extreme and unfair prejudice, i.e., the dismissal of all of their lawsuits against all non-settling Defendants. Where such prejudice exists from the application of a new Constitutional standard, the Supreme Court of the United States has found that the Court which declared the new Constitutional standard has a duty to decide whether retroactive or prospective application of the new standard is appropriate. *See, Chevron Oil Co. v. Huson*, 404

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[5]Literally hundreds of covenants not to sue were expressly approved by the United States District Court for the Eastern District of Virginia in wrongful death cases where Virginia law requires that the court approve any settlement.

U.S. 97 (1971); *United States v. Johnson*, 102 Sup. Ct. 2579, 2587 n.12 (1982); and *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 102 Sup. Ct. 858 (1982)[6] *Chevron* pointed to three factors that should control a decision about whether to apply a new rule only to future cases.

First, "the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedents on which litigants may have relied, . . . or by deciding an issue of first impression whose resolution was not clearly foreshadowed . . ." *Id.* at 355 (citation omitted). Second, the Court must consider whether retroactive application will "further retard" the operation of the new rule. *Id.* Finally, the Court must weigh any "inequity" that would be imposed by retroactive application. *Id.* Applying these factors, a court may elect one of several options, ranging from complete retroactivity, to application only to cases still pending, to a rule of "pure" prospectivity that "denies the benefits of the new rule even to the parties before the court.'" *In re Twin Parks Limited Partnership*, 720 F.2d 1374, 1376 (4th Cir. 1983), *cert. denied*, 104 Sup. Ct. 1602 (1984) (quoting *United States v. Johnson*, 457 U.S. 537, 544 (1982).

All three of the criteria for prospective application of new Constitutional interpretations as described in the *Chevron* case are applicable to the Petitioners. First, the Constitutional protection afforded to substantive rights from the retroactive application of laws that has been announced in the

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[6]See generally, "Ten Years of Non-Retroactivity: A Critique and a Proposal," by Francis X. Beytagh, Va. L. Rev. Vol. 61:1557-1625 (1975).

Dillon decision is a new principle of law whose resolution was not clearly foreshadowed.[7]

Secondly, the prospective application of *Dillon*'s Constitutional protection of substantive rights from the retroactive interpretation of statutes will not retard the operation of the new rule. By determining that the General Assembly did not have the legislative authority to retroactively affect substantive rights of litigants by application of retroactive laws, the Virginia Court set a legislative standard. It would not retard the General Assembly from the passage of unconstitutional legislation to punish litigants who justifiably rely on the presumed Constitutional validity of laws enacted by the General Assembly. Indeed, prospectivity will provide practitioners and litigants with notice of the new standard so that the severe prejudice of unexpected dismissals can be avoided.

Finally, the non-retroactivity of *Dillon*'s ruling will eliminate the severe inequity that would be created by the application of the new standard to parties who have justifiably relied upon the presumed validity of Sec. 8.01-35.1D and previous Virginia case law. This inequity is obvious and severe, i.e., the unexpected dismissal non-settling tortfeasors whose liability would otherwise have required payment of compensation to the Petitioners. As between the litigants, the unconstitutionality of Sec. 8.01-35.1D is an unexpected fortuity for the non-settling Defendants that creates an unfair windfall for the non-settling Defendants and rewards the non-settling

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[7] See, "Release of Joint Tortfeasors--Virginia Code Section 8.01-35.1 and its Retroactive Application," U. Rich. L. Rev. Vol. 18:829-849 (1984); "The Covenant Not to Sue: Virginia's Effort to Bury the Common Law Rule Regarding the Release of Joint Tortfeasors", U. Rich. L. R. Vol. 14:809 at 830 (1980).

Defendants for recalcitrant attitudes toward settlement.

For the foregoing reasons, it is respectfully submitted that the three-pronged criteria of *Chevron* have been met and that the Virginia Court's holding in the *Dillon* case should be applied prospectively only.

CONCLUSION

A Writ of Certiorari should be issued to review the judgment and opinion of the Virginia Supreme Court.

Respectfully submitted,

By

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CERTIFICATE

I hereby certify that a true copy of the foregoing Motion for Leave to File *Amicus Curiae* Brief in Support of Petition for a Writ of Certiorari to the Supreme Court of Virginia was mailed by first-class mail, postage prepaid on the 9th day of October, 1985, to the following persons: Frank J. Ceresi, Esq., 2300 South 9th Street, Suite 112, Arlington, VA 22204; Robert Loftus, Esq., Miles & Stockbridge, 4069 Chain Bridge Road, Fairfax, VA 22030; and The Hon. William G. Broaddus, Acting Attorney General, 101 N. 8th Street, Richmond, VA 23219.

Robert R. Hatten

APPENDIX

INDIVIDUAL AMICUS CURIAE PETITIONERS REPRESENTED BY ROBERT R. HATTEN

Virginia Brown, Executrix of the Estate of Wilbur Brown
Lydia Cole, Executrix of the Estate of William Cole
Carole Thomas, Executrix of the Estate of Bennie Cunningham
Thelma Day, Executrix of the Estate of Naaman Day
Elsie Ellis, Executrix of the Estate of Robert Ellis
Laura Farmer, Executrix of the Estate of Melvin Farmer
Joyce Fleetwood, Executrix of the Estate of John Fleetwood
Dixie Folds, Executrix of the Estate of Guy Folds
Virginia Gregory, Executrix of the Estate of Richard Gregory
Bessie Holloway, Executrix of the Estate of Norman Holloway
Hazel Jamerson, Executrix of the Estate of Berkley Jamerson
Maydell Kilpatrick, Executrix of the Estate of Thomas Kilpatrick
Esselle Lambert, Executrix of the Estate of Ben Lambert
Rodney Llewellyn, Executrix of the Estate of Robert Llewellyn
Eleanor Patrick, Executrix of the Estate of William Patrick
Ruby Phillips, Executrix of the Estate of Valdoie Phillips
Frances Rountree, Executrix of the Estate of Charles Rountree
Emmet Steveson, Jr., Executrix of the Estate of Emmet Stevenson, Sr.
Robert Van Dyke, Jr., Executor of the Estate of Robert Van Dyke, Sr.
Maude White, Executrix of the Estate of John White

Frances Williams, Executrix of the Estate of George Williams
Jeanette Zoumplis, Executrix of the Estate of Chris Zoumplis
Elizabeth Timberlake, Executrix of the Estate of Waverly Timberlake
Dorothy King, Executrix of the Estate of Thomas King
Esmond Harding, Executrix of the Estate of John Harding
Sylvia Boykin, Executrix of the Estate of Jeddy Boykin
Willie Mae Crawley, Executrix of the Estate of Irby Crawley
Dora Oman, Executrix of the Estate of Shirley Oman
Doris Folk, Executrix of the Estate of John Folk
Lucille Treblic, Executrix of the Estate of John Treblic
Clara Long, Executrix of the Estate of James N. Long
Eleanor Adams, Executrix of the Estate of Edward Adams
Areathea Burke, Executrix of the Estate of Johnnie Burke
Louise Coiner, Executrix of the Estate of William Coiner
Matilene Shank, Executrix of the Estate of Charles Shank
Mary Alice Turner, Executrix of the Estate of Richard Turner
Esther Washington, Executrix of the Estate of Ivory Washington
Keziabelle Faircloth, Executrix of the Estate of John Faircloth
Kathryn Furlough, Executrix of the Estate of Isaac Furlough
Harvey Peck, Jr., Executor of the Estate of Harvey Peck, Sr.
Mary Strayer, Executrix of the Estate of Harvey Peck, Sr.
Vennie Davenport, Executrix of the Estate of Gregory Davenport

Mary Nicholson, Executrix of the Estate of Jerrell Nicholson
Mary Staton, Executrix of the Estate of Clyde Staton
Jacqueline Haskins, Executrix of the Estate of Verner Truitt
Joanne Lewis, Executrix of the Estate of Harry Lewis
Lois Montgomery, Executrix of the Estate of James Montgonery
Florence Estes, Executrix of the Estate of Walter Estes
Mary K. Smith, Executrix of the Estate of Woodrow Smith
Geraldine Thrower, Executrix of the Estate of Jesse Thrower
Helen Sawyer, Executrix of the Estate of Hubert Sawyer
Joyce Bradley, Executrix of the Estate of John Bradley
Katie Catron, Executrix of the Estate of Frank Catron
Beatrice Eley, Executrix of the Estate of Francis Eley
Juanita Gilbert, Executrix of the Estate of Roy Gilbert
June Cash, Executrix of the Estate of Ronald Cash
Evelyn Stacey, Executrix of the Estate of Milton Stacey
Hazel Watson, Executrix of the Estate of Homer Watson
Nonie White, Executrix of the Estate of Walter J. White
Joyce Tignor, Executrix of the Estate of Robert Barlow
Mary Barnette, Executrix of the Estate of Alexander Barnette
Elsie S. Barnes, Executrix of the Estate of Edwin E. Barnes
Jerry Michael Cale, Administrator of the Estate of William F. Cale
Irene Coggins, Executrix of the Estate of William H. Coggins
Mary J. Dennis, Executrix of the Estate of Russell A. Dennis

Clara M. Deshields, Administratrix of the Estate of Norman Willoughby Deshields

Yvonne P. Ellington, Administratrix of the Estate of Wayland C. Ellington

Sarah M. Ferris, Administratrix of the Estate of James H. Ferris

Guy Campbell, Administrator of the Estate of Joseph Hart

Michael L. Hill, Sr., Administrator of the Estate of George M. Hill, Sr.

Thelma P. Jones, Administratrix of the Estate of Elbert W. Jones

Charles Wesley Mann, Administrator of the Estate of Elizabeth Frances Mann

Lawrence J. Wiser, Administrator of the Estate of George R. Passaro

Gertrude Rideout, Executrix of the Estate of John Andrew Rideout

Sarah L. Ross, Administratrix of the Estate of Stanley Ernest Ross

Nancy Stack, Administratrix of the Estate of Warren O. Stack

Mildred W. Taylor, Administratrix of the Estate of Richard C. Taylor

C. Belle Louthian, Executrix of the Estate of Fafael Ware

J. James Basgier, Jr., Administrator of the Estate of Milton M. White

Mary Louis T. Archer, Administratrix of the Estate of Raymond B. Archer

Carolyn H. Burrow and William A. Bagley, Jr., Co-Administrators for William A. Bagley, Sr.

Louise Greene Duke, Administrator of the Estate of John Elton Duke, Jr.

William C. Feamster, III, Administrator of the Estate of William C. Feamster, Jr.

Kathryn Ann Gravitt, Administratrix d. b. n. of the Estate of Barksdale E. Gravitt

Pearlene T. Miles, Administratrix of the Estate of Jesse Miles

Alma Steber Reutlinger, Executrix of the Estate of Clarence Reutlinger

Doris Coates, Executrix of the Estate of James P. Coates

Cora Lee Hardy and Stephen C. Hardy, Co-Administrators of the Estate of Carl C. Hardy, Jr.

Doris F. Isenhower, Administratrix of the Estate of Max H. Isenhower

Rachel E. Knick, Administratrix of the Estate of Earl B. Knick

Ida L. Miltier, Executrix of the Estate of Joseph Miltier

Martha W. Morris, Executrix of the Estate of Rufus Hamilton Morris III

James R. Revell, Administrator of the Estate of Charles E. Ravell, Sr.

John C. Lumpkin, Administrator of the Estate of George H. Riddick

Nancy Cook Robertson, Executrix of the Estate of James H. Robertson

Ellen Ann Rooney, Executrix of the Estate of Henry Francis Rooney

Thelma R. Harts, Executrix of the Estate of Cephus Roscoe

Hattie S. Thornton, Administratrix of the Estate of Cedric W. Thornton

Marylin C. Tolson, Administratrix of the Estate of John T. Tolson, Jr.

Louella Vess, Administratrix of the Estate of James A. Vess

Evelena Wells, Executrix of the Estate of Jessie Wells

Edith D. White, Executrix of the Estate of Linwood Erle White, Jr.

Peggy Lawrence, Administratrix of the Estate of Edward Delaware Lawrence

Betty Hobbs, Executrix of the Estate of William Staley Hobbs

Linda Ann Oliver, Administratrix of the Estate of William Lewis

Esther Bailey, Executrix of the Estate of Samuel Bailey
Dorothy Coday, Executrix of the Estate of Jack Coday
Sadie V. Cooke, Executrix of the Estate of Walter Cooke
Mae Kellis, Executrix of the Estate of Fred K[illegible]is
Ruth Martin, Executrix of the Estate of Elme[illegible]Martin
Lucille Mixon, Executrix of the Estate of Henry Mixon
Bessie L. Ryan, Executrix of the Estate of William Ryan

Louis Bagley
Clyde Baity
Perry Barclift
Robert Barnes
Edgar C. Barrett
Robert H. Bass
Chester Bellamy
Percell Beverly
John H. Bobbitt
George G. Bosher
Bobby Brady
Horace Brinson
Jesse L. Britton
Clarence C. Brock
Otha B. Brodnax
Frederick Brown
Arthur C. Burris
Henry O. Byrd
James L. Canady
Reginald C. Cannon
William T. Carmines, Jr.
Robert Carter
John L. Charity
William Clark
Hillard Coffie
Ellis R. Colbert
Walter I. Cooper
William Cooper
Benjamin Craddock
Nelson U. Crosby

Alvin Davidson
Jesse O. Davis
Percy O. Davis
Robert Dudley
Woodrow Duncan
Edward C. Dunn
Jesse C. Dunning
Anthony J. Dusseau
Thomas Elliott
Donahue Ellis
William J. Embler
Jerry Evans
William Evans
David J. Evers
Wallace Fairfield
James Favre
Joseph L. Firth
William Firman
Richard B. Flora
Charles I. Floyd
Charles Forrester
Hobert L. Furr
Shirley A. Garris
Willie Gibbons
William F. Glazier
Gerald Gorde
John Gould
James Groome
David Guthrie
Lacy Hall

Arthur Croxton
Dallas P. Cutler
Arthur M. Daniel
Elliott Gupton
Orian I. Leonard
Billy Ray Lockard
Woody London
Roscoe D. Loyd
John Luter
James A. Mahady
Major T. Manning
Edward A. Mason
Robert Massengill
Hugh McCain
Walter D. McCloud
Samuel Midyette
Joseph N. Moody
Irving T. Moore
Wilton Moore
James Morant
Jesse V. Myers
James R. Neeley
John F. Newton
Delbert Nicholas
James T. Oman
Hardy Osborne
Ray T. Outland
George C. Overman
Garland C. Parrish
David F. Peele
Bernis Pierce
Dorsey Pittman
Clyde Powell
Clarence Pruitt
Dallas Pruitt
Frank Randolph
James R. Raynor
Hugh V. Reynolds
Margie Thomas
Emory L. Thompson
Fred Thompson

Joseph Haymore
Ralph F. Henderson
Thomas E. Henderson
James H. Hershman
Garland R. Hess
John Gill
Jesse E. Hitt
M. J. Hobgood
James Hogge
Thomas J. Hogge
Maurice Holloway
Wilbur Holt, Sr.
George S. Hopkins
Alexander Howard
Floyd A. Hudgins
Jay P. Huneycutt
Colden Hyman
Linwood Illich
Roy E. Jackson
Jesse E. James
Gaston B. Jamison
Albert Johnson
Colonel D. Jones, Jr.
Herman F. Jones
Wilson W. Jones
Charlie Keatts
Raymond Kerr
Woodrow Kincaid
John O. Kirby
Claude E. Lane
Eugene Langley
Garnett LaPrade
Albert Lawrence
Ernest H. Lawson
Paul Lee, Sr.
Bruce T. Leggett
Cecil B. Leigh
Robert P. Riggs
William K. Roach
Robert Roane
Henderson Roberts

Robert Thompson
Walter Thon
William Thrasher
Jesse Topping
Clinton A. Townsend
Ted Treadway
Leon Treadwell
Compton Turner
John B. Tweedy
Arthur Volhein
Fred Walker
Claude R. Watts
Ethell C. West
James West
James White
Otis White
Conley C. Wilds
James H. Williams
James M. Williams
William Williams
Raymond D. Wilson, Jr.
Thomas Woodard
James Worsley
James R. Wright
Melvin Wright
B. C. Young, Jr.
Herbert Yow
Robert A. Burke, Jr.
Tommy Nelson Hare
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Curtis F. Rogers
Roy L. Roper
Norman Rosson
Herbert Roughton
George Sanders
Charles Saunders
Edker Saunders
Melvin Saunders
Thomas R. Sawyer
William Sawyer
Henry Schaffer
Robert Schaffer
Edward Scott
John C. Scruggs
Rudolph Shearin
Carter Sibley
Jeremiah Silver
Cleveland Slade
Woodrow Slate
Forrest Smith
Roy Snead
Steve Sokol
John H. Speight
James M. Spruill
Albert J. Stancill
Joseph Sullivan
Edward S. Taylor
James Thomas
Frank J. Nagy, Sr.
John R. Winborne
Robert L. Aldridge, Jr.
Curtis R. Allison
Vincent Barresi
Thomas G. Bashara
William L. Bazemore
James Beacham
Carlton B. Bell
William E. Broaddus
James M. Bruce

Wallace L. Hobbs
Maurice H. Lane
Edward N. Lutz
Burrell M. Patillo
George R. Waymack, Jr.
James E. West
Hayes L. Whiddon
Leone Maxine Sheffer (deceased)
Arthur J. Golden (deceased)
Homer C. Crane (deceased)
Moses Lee Johnson
Albert Ray Long
Ray W. McClung
Horace F. Nichols
Esker Eddie Reed, Jr.
Irvin B. Slayton
Clyde K. Tysor

Rufus H. Buffaloe
Francis Marion Cave
Silver J. Ciccone
Earl Clow, Jr.
William E. Cross
James M. Doby
Grant Ensley
Bobby A. Felts
Robert A. Harrell
Willie M. Hudson
Robert P. Kucharski
Charles Wesley Mann
Lemuel Lee Newsom
James L. Pigg
Benny J. Sessions
Weeks Smith
Robert H. Weaver